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Lisa T. McElroy

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"Every citizen should know what the law is, how it came into existence, what relation its form bears to its substance, and how it gives to society its fibre and strength and poise of frame."[1]

I. INTRODUCTION

For most of the Supreme Court's history, a story about the Court has been playing out in the American consciousness. It is not a story about Supreme Court jurisprudence, or ideology, or decision making. It is not a story about personalities or Court composition. No, this story is about the Supreme Court as a priesthood, as a mystical quasi-religious body, as an aristocracy, one removed from and inaccessible to the general American public. Scholars over the decades have referred to the mythology surrounding the Supreme Court,[2] usually grounding the conversation in a discussion of legal realism.[3]

But the Court itself would—and does—purport to tell a tale other than one of majesty, aristocracy, and disengagement from the people. In the Court's narrative of its institutional priorities, it is transparent and

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* Associate Professor of Law, Drexel University Earle Mack School of Law. J.D., Harvard Law School; M.P.H., the University of Michigan; A.B., Dartmouth College. The author would like to thank Kathy Arberg (United States Supreme Court), Dahlia Lithwick (Slate), Adam Liptak (*New York Times*), Michael Sacks (Huffington Post, First One @ One First), and Lyle Denniston (SCOTUSblog); Supreme Court advocates Carter Phillips and Patricia Millett; Professors Michael Dorf, Farha Ghannam, and Sarah Ricks; the faculties at Drexel Law, the University of New Hampshire School of Law, and the University of Missouri-Kansas City School of Law; and researchers John Cannan, Claudia Hage, and Tony Chiaramonte.

1. Woodrow Wilson, *Legal Education of Undergraduates*, 17 A.B.A. REP. 439, 442 (1894), *quoted in* Albert E. Harum, *The Case for an Undergraduate Law Elective in Liberal Arts*, 12 J. LEGAL EDUC. 418, 422 (1960).

2. One recent paper has traced the societal acceptance of this myth, citing to scholars who assert that the Court's mystique was more prevalent earlier in our country's history, with the public recently becoming more aware of "the indeterminacy of legal norms." Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 251–55, 272 (2011).

3. *See, e.g.*, *id.* at 247 (discussing "the mythical image" of the Court as legalistic in nature); Arthur Selwyn Miller, *Some Pervasive Myths about the United States Supreme Court*, 10 ST. LOUIS U. L.J. 153, 171–76 (1965) (debunking the myth that Supreme Court Justices are "human automaton[s] rigidly applying known rules of law, which are found or discovered and never created, to the facts of the case before the court").

accountable, accessible and informative, speaking to the country through its opinions and available to the public in its temple on the Hill. While the institution and the individual Justices acknowledge that the average member of the public knows less than she ideally would about the judicial branch, the Court attributes that ignorance, not to its own practices and procedures, but to forces outside its power and control. According to the people, however, there is one simple and obvious path to learning about the Court, one that other branches of the federal government have modernly adopted: television coverage of the institution's proceedings.

Most of the Justices themselves have consistently and vigorously resisted cameras in the marble palace.[4] These Justices have treated the issue as one that should be solely within their discretion, an administrative concern left up to them.[5] While several Justices have indicated that they would explore the idea, for example, "after really pretty serious research and study,"[6] others have indicated that they emphatically oppose it.[7] Even those who might eventually support the

4. *See, e.g.*, *Souter Won't Allow Cameras in High Court*, L.A. TIMES, Apr. 9, 1996, at A6.

5. *See, e.g.*, *Financial Services and General Government Appropriations for 2009: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. 124 (2008) (statement of Thomas, J.) ("I think the additional concern is, who gets to [decide whether to have cameras at the Supreme Court]? . . . [T]o the extent that that decision should be made, I think it is felt that the judiciary should make the call."); *id.* at 123 (statement of Kennedy, J.) ("I think that almost all of my colleagues . . . are very concerned that the legislature, that the Congress, would mandate televised coverage of our proceedings.").

6. *The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices November 10, 2005*, 25 BERKELEY J. INT'L L., 71, 86 (2007) (quoting Justice Stephen Breyer speaking at the American Bar Association Rule of Law Symposium Panel on the role of the judiciary held on Nov. 10, 2005).

7. Consider, as examples, statements by the Justices. Justice Scalia: "Not a chance, because we don't want to become entertainment. I think there's something sick about making entertainment out of real people's legal problems." Maria Bartiromo, *Justice Scalia Says "Not a Chance" to Cameras*, TODAY, Oct. 11, 2005, http://today.msnbc.msn.com/id/9649724/ns/today/t/justice-scalia-says-not-chance-cameras/#.UH83OlbF3Kc [hereinafter CNBC Interview]. Justice Kennedy: "[A]ll in all, I think it would destroy a dynamic that is now really quite a splendid one, and I do not think we should take that chance." *Financial Services and General Government Appropriations for 2008: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. 29 (2007) (statement of Kennedy, J.). Justice Thomas: Cameras at the Court would "change [its] proceedings . . . [not] for the better." *Departments of Transportation, Treasury, HUD, the Judiciary, District of Columbia and Independent Agencies Appropriations for 2007: Hearings Before the Subcomm. on Dep'ts. of Transp., Treasury, HUD, the Judiciary, D.C., and Indep. Agencies Appropriations of the H. Comm. on Appropriations*, 109th Cong. 225 (2006) (statement of Thomas, J.). Justice Ginsburg: "From [a list of funny statements Justices made during oral arguments in the 2010 Term], you may better understand why the Court does not plan *to permit* televising oral arguments any time soon." Justice Ruth Bader Ginsburg, *A Survey of the 2010 Term*

idea have asserted that the Court is not yet ready.[8] Famously, while still on the Court, Justice Souter was so disgusted with the idea of cameras in the Court that he publicly stated that death was preferable.[9]

The Justices deny the need for cameras, arguing that the Court is transparent and accessible even without them. They create an image of educating the public about their work by writing books,[10] appearing on television,[11] and creating websites.[12] They purport to deconstruct the mysticism of the Court with occasional peeks into limited aspects of the institution. But what the Justices allow the public to see is nothing more than a façade; the Justices' outreach barely scratches the surface, allowing the public to see only what the Justices offer and nothing more.

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for Presentation to the Ostego County Bar Association 6 (July 22, 2011) (transcript available at http://lawprofessors.typepad.com/files/rbg-2011-ot.pdf) (emphasis added). Chief Justice Roberts: During his confirmation hearings, he stated that he would be willing to consider broadcasting oral arguments, but later said that he would want the Court to be very careful about it. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 324 (2005) (statement of Roberts, J.); Bob Egelko, *Chief Justice Vetoes Idea of Televised Hearings*, S.F. CHRON. (July 14, 2006), http://www.sfgate.com/bayarea/article/SUPREME-COURT-Chief-justice-vetoes-idea-of-2531659.php (quoting Chief Justice Roberts). However, Justice Kagan supports the idea. *See Conversation with Associate Justice Elena Kagan* (C-SPAN television broadcast Aug. 2, 2011), *available at* http://www.c-spanvideo.org/program/JusticeEle (responding to a comment by the moderator that the Supreme Court would not be the least understood branch of government if there were cameras in the courtroom, Justice Kagan said, "[I] do think [cameras are] a good idea . . . . [b]ecause reading about it is not the same experience . . . .").

8. For example, Justice Breyer explained that the Court would need to feel comfortable with the idea of cameras in the courtroom, described the process as a "long, complicated matter," and said, "we are not there yet." *Financial Services and General Government Appropriations for 2011: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 111th Cong. 93–94 (2010) (statement of Breyer, J.).

9. *See Souter Won't Allow Cameras in High Court*, *supra* note 4 (Justice Souter: "The day you see a camera come into our courtroom it's going to roll over my dead body.").

10. *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK ix (2010) ("I believe it is important for those who are not lawyers to understand what the Court does and how it works . . . ."). *See generally, e.g.*, JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR (2011); SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE (2003); WILLIAM H. REHNQUIST, THE SUPREME COURT (rev. updated ed. 2002).

11. *See, e.g.*, CNBC interview, *supra* note 7; C-SPAN, *Justices in Their Own Words*, http://supremecourt.c-span.org/Video/JusticeOwnWords.aspx; *Dateline NBC: Interview with Sandra Day O'Connor* (NBC television broadcast Jan. 25, 2002), *available at* https://archives.nbclearn.com/portal/site/k-12/browse/?cuecard=5367 (registration required for online access).

12. *See, e.g.*, ICIVICS, http://www.icivics.com (last visited Jan. 23, 2013) (civics website including information about the Supreme Court, founded by Retired Associate Justice Sandra Day O'Connor).

In this version of the story, the Justices are Luddites, unfamiliar with modern technologies or societal concerns.

Concerns about public access to the Supreme Court have come up in various contexts, including congressional hearings.[13] The issue arises because, aside from the presumed right of Americans to see their government in action, the American public arguably knows far less about the Supreme Court than about other, more open government institutions.[14] The Court cannot decide political questions,[15] and

13. *See, e.g.*, *Financial Services and General Government Appropriations for 2008: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. 32 (2007) (statement of Rep. José R. Serrano) ("It is so important to me, the public access to the buildings. You are obviously, with all of the construction going on, not satisfied with the public access. But has it improved in spite of that problem? Are there more people who want to visit the Court than before . . . ?"); *Financial Services and General Government Appropriations for 2011: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 111th Cong. 88 (2010) (statement of Rep. José R. Serrano to Associate Justice Clarence Thomas) ("I think you said [in past hearings] part of what we wanted to accomplish [with the modernization project] was not only to make the building more workable for everyone, but also to make it easier for folks to visit. Do you think we have accomplished that?").

14. For example, in 2010, while Elena Kagan was awaiting confirmation to the Court, a poll found that two-thirds of Americans could not name any Supreme Court Justice, while only 1% could name all nine. *See Two-Thirds of Americans Can't Name Any U.S. Supreme Court Justices, Says New FindLaw.com Survey*, FINDLAW.COM (Aug. 20, 2012), http://company.findlaw.com/press-center/2012/two-thirds-of-americans-can-t-name-any-u-s-supreme-court-justice.html. In a 2006 poll, 77% of U.S. residents were able to recall the names of two of the dwarfs in the "Snow White" fairy tale, but only 24% could name two Supreme Court Justices. *See New National Poll Finds: More Americans Know Snow White's Dwarfs than U.S. Supreme Court Judges . . . Homer Simpson than Homer's Odyssey, and Harry Potter than Tony Blair*, AOL., http://ir.aol.com/phoenix.zhtml?c=147895&p=irol-newsArticle&ID=1357743&highlight= (last visited Jan. 23, 2013). In the same poll, "[n]ot surprisingly, Clarence Thomas, whose nomination was marked with controversy, was the most recognized Justice—identified twice as often as his next best-known peer on the Supreme Court—Antonin Scalia." *Id. See also Journalists on the Workings of the Supreme Court*, C-SPAN, http://supremecourt.c-span.org/Video/TVPrograms/SC_Week_Monday.aspx (last visited Jan. 23, 2013) ("The Supreme Court is the most mysterious branch [of government] to the public. They do their work in a marble building where cameras aren't allowed. They are not recognizable generally to the average person on the street. And then they speak to the public through their opinions. So in some ways, they're very public, because anything that they do that will matter in your life will be down on [sic] black and white in a Court opinion, but yet they themselves will not be publicly announcing that before a camera. So there is a real mystery to the Supreme Court.").

15. *See, e.g.*, Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947) ("[T]he policy against entertaining political questions . . . is one of the rules basic to the federal system and this Court's appropriate place within that structure."); Marbury v. Madison, 5 U.S. 137, 170 (1803) ("Questions, in their nature political . . . can never be made in this court."). *See generally* Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

therefore its decision-making process focuses on different kinds of issues, issues unfamiliar to a public more accustomed to debate about whether to pass a new jobs bill[16] or whether a political candidate will prevail in the next election.[17]

Through its rituals, its physical presence, its procedures, and its public statements, the Court delivers a message that average Americans are not central to its workings. By creating an atmosphere where the public perceives symbols, the Court perpetuates an Oracle of Delphi-like mythology. As one scholar has observed, however, "symbol and myth may provide a weak foundation for the Court's institutional legitimacy."[18] According to another, "We are far from a rational analysis and explication of the Supreme Court and its role in the American polity. There are many roads to the truth about this peculiarly American institution. One of them would seem to be a close and hard look at the myth structure that surrounds it."[19]

This Article employs narrative theory to deconstruct the stories the Supreme Court tells about itself and its opposition to cameras at the Court, analyzing whether cameras in the courtroom would alter the story the Court wishes to tell from an aristocratic to a democratic one. It considers whether the Court's narrative about preserving public confidence in the Court through privacy and tradition is a carefully constructed myth or a story based in fact. Finally, it asks whether there is enough inherent value in the Court's preservation of its mystique to outweigh the public's interest in seeing its government at work.

16. *See* The American Jobs Act of 2011, S. 1549, 112th Cong.

17. *See, e.g.*, Nate Silver, *Is Obama Toast? Handicapping the 2012 Election*, N.Y. TIMES MAG. (Nov. 3 2011), http://www.nytimes.com/2011/11/06/magazine/nate-silver-handicaps-2012-election.html?_r=1&ref=politics.

18. Jeffery J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 12 POL. BEHAV. 363, 364 (1990); *see also* Eric Segall & Nancy S. Marder, *Should the Supreme Court Be Televised?*, N.Y. TIMES UPFRONT (Feb. 20, 2012), http://gsulawfaculty.com/2012/03/06/segall-on-televising-the-supreme-court (Eric Segall arguing that "[n]ot televising the Supreme Court's hearings reaffirms the false idea that it operates in a rarified, nonpolitical arena").

19. Miller, *supra* note 3, at 156.

II. BACKGROUND

A. The History of the Controversy over Cameras at the Supreme Court

The majority of Americans think that the press should be able to broadcast audio and video of activities at the Supreme Court.[20] In fact, according to one poll, that sentiment is stronger than it has ever been, with 78% of Americans in 2011 responding that they either mildly or strongly agree with the statement, "Broadcasters and others should be allowed to televise the proceedings of the United States Supreme Court."[21]

Were Supreme Court arguments filmed for broadcast, most Americans would be able to access these broadcasts on network television, cable television, or Internet streaming. Almost 115 million households—about 96% of those in the United States—have a television set,[22] and about 57 million of these subscribe to some form of cable service.[23] According to a May 2011 Pew Internet and American Life Project survey, 78% of adults use the Internet, and these results hold generally for gender and age, with the exception of those over the age of sixty-five.[24] Another Pew survey showed 66% of adults had a high-speed broadband connection at home.[25]

Certainly, the other two branches of government have for many years embraced cameras as an important way of reaching the public and allowing the public to access them.[26] C-SPAN, the cable channel[27] that

20. FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2011, at 7, *available at* http://www.firstamendmentcenter.org/madison/wp-content/uploads/2012/03/sofa-2011-report.pdf (showing that in 2011, 54% of those polled strongly agreed while in 1997, only 44% strongly agreed).

21. *Id.* (showing that 73% agreed in 1997).

22. *See Nielsen Estimates Number of U.S. Television Homes to Be 114.7 Million*, NIELSENWIRE (May 3, 2011), http://blog.nielsen.com/nielsenwire/ media_entertainment/nielsen-estimates-number-of-u-s-television-homes-to-be-114-7-million.

23. *See* Nat'l Cable and Telecomm. Ass'n, *Industry Data*, CABLE, http://www.ncta.com/Statistics.aspx (last visited Jan. 23, 2013).

24. PEW INTERNET, DIGITAL DIFFERENCES 5 (2012), *available at* http://pewinternet.org/Reports/2012/Digital-differences.aspx.

25. PEW INTERNET, HOME BROADBAND 2010, at 5 (2010), *available at* http://pewinternet.org/Reports/2010/Home-Broadband-2010.aspx.

26. C-SPAN began broadcasting on March 19, 1979. T.R. Reid, *C-SPAN Gauged 25 Years After Start; Network Has Given Public Wider Access to Congress*, WASH. POST, Mar. 19, 2004, at A21.

27. C-SPAN actually encompasses three networks and as many as twenty-five websites. Thomas Heath, *Creating an Innovative Format for Distributing Information*, WASH. POST, Sept. 19, 2011, at A13.

broadcasts congressional sessions, has been called "America's ultimate reality show,"[28] offering viewers "a window on their government."[29] More importantly, the public seems to respect the network, with 64% of respondents in a 2004 poll who had never watched its broadcasting still opining that it was "very" or "somewhat" useful for Americans.[30] Some scholars have commented that C-SPAN contributes civic value in three ways: (1) "it provides the opportunity for citizens to watch government in action";[31] (2) it educates the public about important public issues;[32] and (3) it encourages the exchange of ideas and progress towards solving political issues.[33] The Second and Ninth Circuits have been part of a

28. Mark Jurkowitz, *Politics as Visual: C-SPAN Celebrates a Quarter-Century of Picturing Government at Work*, BOS. GLOBE, Mar. 15, 2004, at B7. *But see* Dahlia Lithwick, *I Want My Court TV*, GUARDIAN (United Kingdom), Oct. 12, 2011, http://www.guardian.co.uk/law/2011/oct/12/us-supreme-court-should-be-televised?fb=optOut ("[R]eality television has conspired to trivialise and ridicule people desperate to have their lives trivialised and ridiculed. That's why 'reality television' is a misnomer. It's carefully scripted to be anything but. But the courts are different. They are, by and large, the most rational and respectful institution of a democracy.").

29. Jurkowitz, *supra* note 28. At least one scholar has expressed the opinion that the Senate would have "fade[d] into public irrelevance if it kept its proceedings closed to the public." Stephen E. Frantzich, Television and Congress: The Voyage to Public Understanding 1–2 (unpublished manuscript) (online at http://www.wilsoncenter.org/sites/default/files/frantzichtv.doc) (summarizing material also presented in Stephen Frantzich & John Sullivan, THE C-SPAN REVOLUTION (1996)) (commenting on the Senate's reasons for joining the House of Representatives in allowing C-SPAN coverage). *Cf.* THE PEW RESEARCH CTR. FOR PEOPLE AND THE PRESS, AMERICANS SPENDING MORE TIME FOLLOWING THE NEWS 87 (2010), *available at* http://www.people-press.org/files/legacy-pdf/652.pdf (showing that, in spite of the argument of relevance, few Americans watch C-SPAN at all: 4% of those polled watch C-SPAN "regularly," 17% watch "sometimes," 19% watch "hardly ever," and 60% "never" watch).

30. Jurkowitz, *supra* note 28; *The C-SPAN Audience After 25 Years . . .* , THE PEW RESEARCH CTR. FOR PEOPLE & THE PRESS (Mar. 2, 2004), http://www.people-press.org/2004/03/02/the-c-span-audience. *Cf.* Frantzich, *supra* note 29, at 3 ("Except for highly publicized events . . . much of the C-SPAN audience is inadvertent. . . . Only a very small segment of the population has the motivation or knowledge to tune into C-SPAN specifically to see a congressional session."); THE PEW RESEARCH CTR. FOR PEOPLE AND THE PRESS, *supra* note 29, at 75 (finding that only approximately 25% of those polled believe "all or most" of what C-SPAN says). As Stephen E. Frantzich has observed, however, it is difficult to separate a viewer's belief in the speaker (i.e., a member of Congress) from her belief in the television forum (i.e., C-SPAN). Frantzich, *supra* note 29, at 7.

31. David D. Kurpius & Andrew Mendelson, *A Case Study of Deliberative Democracy on Television: Civic Dialogue on C-SPAN Call-in Shows*, 79 JOURNALISM & MASS COMM. Q. 587, 590 (2002).

32. *Id.*

33. *Id.* This last way may seem irrelevant when it comes to the Supreme Court, as the public may not participate in its decision-making; the public may become involved, however, in effecting political change to override Supreme Court decisions. *See, e.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (statute passed in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that employers could not be sued for discriminatory pay practices under Title VII of the Civil Rights Act if too much time had

pilot program to test cameras in federal appellate courtrooms,[34] and the Judicial Conference recently voted to begin a pilot program with cameras in fourteen federal district courts.[35] The Senate and House of Representatives have regularly introduced legislation—led but not initiated by Senator Arlen Specter[36]—to require the Court to allow the broadcast of oral arguments and other public Court proceedings.[37] While this kind of legislation has never come up for a vote of the full House or Senate, at least some Members continue to see it as an important public concern and one subject to congressional control.[38]

Those who support allowing cameras in the Court argue that broadcasting the Court's work would improve transparency, result in more informed public perception about the Court,[39] and increase interest

elapsed)); Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (statute passed in response to the Supreme Court's decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (upholding against a Free Exercise challenge "neutral laws of general applicability")).

34. *History of Cameras in the Federal Courts*, U.S. COURTS, http://www.uscourts.gov/Multimedia/Cameras/history.aspx (last visited Jan. 23, 2013).

35. *See, e.g.*, Ashby Jones, *Cameras Coming to Federal Court . . . (Limitations Attached)*, WALL ST. J.L. BLOG (June 9, 2011), http://blogs.wsj.com/law/2011/06/09/cameras-coming-to-federal-court-limitations-attached.

36. R. Patrick Thornberry, Note, *Televising the Supreme Court: Why Legislation Fails*, 87 IND. L.J. 479, 479–80 (2012); Interview with Arlen Specter, Former Pa. Senator, U.S. Senate, in Phila., Pa. (Feb. 17, 2012) (As Specter has said, cameras at the Court are important to all Americans, and his bills were premised upon the fact that "[h]owever many people watch, we're that much ahead.").

37. *See* S. 410, 112th Cong. (2011); H.R. 3054, 111th Cong. (2009); S. 657, 111th Cong. (2009); S. 446, 111th Cong. (2009); H.R. 2128, 110th Cong. (2007); S. 352, 110th Cong. (2007); S. 344, 110th Cong. (2007); H.R. 4380, 109th Cong. (2005); S. 1768, 109th Cong. (2005); H.R. 2422, 109th Cong. (2005); H.R. 1751, 109th Cong. (2005); S. 829, 109th Cong. (2005); H.R. 2155, 108th Cong. (2003); S. 554, 108th Cong. (2003); H.R. 2519, 107th Cong. (2001); S. 986, 107th Cong. (2001); S. 3086, 106th Cong. (2000); H.R. 1281, 106th Cong. (1999); S. 721, 106th Cong. (1999); H.R. 1252, 105th Cong. (1998); H.R. 1280, 105th Cong. (1997); H.R. 594, 104th Cong. (1995); H.R. 5307, 103d Cong. (1994); H.R. Con. Res. 444, 96th Cong. (1980).

38. *See* Arlen Specter, Editorial, *Hidden Justice(s)*, WASH. POST, Apr. 25, 2006, at A23. *Cf.* THIRD BRANCH NEWS, *Judicial Conference Opposes Bill to Bring Cameras into Courts*, U.S. COURTS (Sept. 2000), http://www.uscourts.gov/News/TheThirdBranch/00-09-01/Judicial_Conference_Opposes_Bill_to_Bring_Cameras_into_Courts.aspx (noting Senator Orrin Hatch has called for deference to the Court on the issue).

39. E-mail from Patricia Millett, Partner, Akin, Gump, Strauss, Hauer, & Feld, to author (Aug. 20, 2012, 07:07 EDT) (on file with author) (Ms. Millett has argued twenty-eight cases before the Supreme Court.) ("When I think about it objectively and take my personal interests out of the picture, I think cameras should be there. This is the head of the Third Branch of government and it is misunderstood and most Americans are not well informed about how the Court operates and makes its decisions, notwithstanding the enormous impact the Court has on our lives. I also think government has an obligation to make its public events as accessible as possible. This is, after all, not a private proceeding. It is meant to be public and witnessed by the public. So why not all of the

on the part of average Americans about what goes on in the "marble palace"[40] at One First Street NE.[41] In fact, Justice Anthony Kennedy has said as much, writing,

> Minds are not changed in the streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may need to be changed as technologies change.[42]

And in 1988, Chief Justice Rehnquist even allowed thirteen media organizations to engage in a simulation in the Supreme Court courtroom,[43] but the Justices ultimately rejected the idea without explanation.[44]

In fact, "[t]he debate about the propriety of cameras in U.S. courtrooms runs much deeper than their effect on popular culture and public perception of the justice system."[45] That debate may well resonate on a profound level because of the competing stories of Court aristocracy and participatory democracy.

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interested public?").

40. *See, e.g.*, Justice Clarence Thomas, Remarks at the Utah State Bar Convention (July 17, 2010) ("[The Supreme Court] truly is a marble palace [because] we're isolated. We're isolated from the politics, we're isolated from the city and in a lot of ways we're isolated from the country." (alterations in original)), *quoted in* Jamshid Ghazi Askar, *Clarence Thomas Calls Supreme Court a 'Marble Palace'*, DESERET NEWS (July 18, 2010), http://www.deseretnews.com/article/700048984/Clarence-Thomas-calls-Supreme-Court-a-marble-palace.html?pg=all; *see also generally* Laura Krugman Ray, *Inside the Marble Palace: The Domestication of the Supreme Court*, 12 GREEN BAG 2D 321 (2009) (reviewing CHRISTOPHER BUCKLEY, SUPREME COURTSHIP (2008)); TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK (2006).

41. While it is true that most Americans probably would not watch Supreme Court sessions gavel to gavel, opportunity is key. What's more, unlike Congressional sessions (called "irregular" by one scholar, *see* Frantzich, *supra* note 29, at 3), Supreme Court oral arguments and orders take place on a previously announced, set schedule. *See, e.g.*, *Supreme Court Calendar: October Term 2011*, U.S. SUPREME COURT, http://www.supremecourt.gov/oral_arguments/2011TermCourtCalendar.pdf (indicating, prior to the beginning of the Term, dates for oral argument, non-argument sessions, conferences, and holidays for the entire nine-month Term).

42. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring) (citation omitted).

43. The simulation reportedly involved a camera aimed at the Justices' bench and another aimed at the advocates' podium. *See Cameras in the Supreme Court: A Dry-Run for the Justices*, BROADCASTING, Nov. 28, 1988, at 57; *see also* RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 150 (1994).

44. *See* DAVIS, *supra* note 43, at 150.

45. Henry F. Fradella & Brandon Burke, *From the Legal Literature*, 43 CRIM. L. BULL. 820, 822 (2007).

B. Law and Narrative

> *"Both the public and the scholar have found absorbing the ways law brings together story, form, and power."*[46]

People think in stories, in narrative: such is the power of rhetorical theory. As Professor Linda Berger has noted, "Metaphor and narrative reassure us that things hang together, providing a sense of coherence to the patterns and paths we employ for perception and expression."[47]

In legal scholarship, narrative theory has focused largely on two key subtheories: looking at the stories that language tells,[48] and evaluating and exploring how legal issues are inevitably ensconced in stories.[49] Deconstructing language and stories, the theory supposes, can tell us a great deal about the functioning of law.[50] What's more, legal storytelling theory can expose the less-heard versions of stories, those of the disenfranchised, even to reluctant listeners.[51] Professor Berger explains, "[N]arrative analysis . . . is a tool for uncovering and discovering."[52] But scholars recognize the grip that even simple stories hold: "This storytelling movement raises many important challenges and questions . . . . Do stories, compared to other kinds of discourse in law, have a distinctive power?"[53]

As Paul Gewirtz has observed,

> Examining law as narrative and rhetoric can mean many different things: examining the relation between stories and legal arguments and theories; analyzing the different ways that judges, lawyers, and litigants construct, shape, and use stories; evaluating why certain stories are

46. Paul Gewirtz, *Narrative and Rhetoric in the Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 2 (Peter Brooks & Paul Gewirtz eds., 1996).

47. Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 275 (2011).

48. *See generally, e.g.*, James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).

49. *See generally* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 46; Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). *Cf. generally* Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 141 (1997) (seeking a clearer definition of "how meaning is made in law").

50. *See generally, e.g.*, JAMES BOYD WHITE, THE LEGAL IMAGINATION (1973).

51. *See generally* Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

52. Berger, *supra* note 47, at 282.

53. Gewirtz, *supra* note 46, at 5.

> problematic at trials; or analyzing the rhetoric of judicial opinions, to mention just a few particulars.[54]

With respect to the Supreme Court, scholarship based on storytelling theory has mainly considered two different kinds of stories: those found in judicial opinions[55] or merits briefs,[56] and those that the Court tells through its rituals and traditions, its practices and procedures.[57] In analyzing whether the Court's refusal to allow cameras in the courtroom is part of a bigger story, this Article focuses on that second type of story[58]: what story the Court tries to tell the world about itself as an institution, and whether cameras would interfere with that story, exposing the metaphorical man (read: men and women) behind the curtain[59] or reinforcing the Court's seeming vision of itself as aristocratic.

Of course, as Professor Linda Edwards has observed,

> This matter of evaluation raises the even thornier question of truth and falsehood, whatever those terms may mean in the context of narrative. . . . [T]he reality we perceive is not simply observed and

54. *Id.* at 3.

55. *See generally, e.g.*, ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000) (deconstructing Supreme Court opinions for implied narratives).

56. *See, e.g.*, L. H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995) (analyzing *Marbury v. Madison* and *McCulloch v. Maryland*); Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 885 (2010) (describing the "birth story from the Petitioner's Brief in *Miranda v. Arizona* and then the rescue story from the Respondent's Brief in *Bowers v. Hardwick*").

57. *See generally, e.g.*, Alpheus Thomas Mason, *Myth and Reality in Supreme Court Decisions*, 48 VA. L. REV. 1385 (1962); Miller, *supra* note 3. *See also* Susan S. Silbey, *The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere*, 2 PERSP. ON POL., 785, 785 (2004) (explaining how the opening day of the Supreme Court's term has become a sacred ritual).

58. Certainly, there is more to the story of cameras in the Supreme Court than this paper can address, and that is proper. The logistics of cameras in the courtroom, if we agree that they should be there, may be best left to the Court to decide, in the spirit of deference on the details if not the overarching theme. Toward that end, this Article does not seek to answer the questions of how, when, and where the cameras should broadcast. For example, while the question of whether oral arguments would be broadcast live or on Friday afternoons raises its own set of issues; either decision has its merits, and I do not presume to suggest to the Court how it should carry out this task. Similarly, where the cameras would be located is likely a decision best suited for the Court and the broadcasters to explore.

The Article also does not try to make broader or empirically based claims about enhanced legitimacy or enhanced understanding of the Court's work.

59. Before each oral argument, the Justices appear on the bench from behind the red velvet curtains, calling to mind magicians or perhaps the Wizard of Oz. *See* L. FRANK BAUM, THE WONDERFUL WIZARD OF OZ (1900).

> reported, but rather it is constructed through language. . . . [I]t is a complicated question indeed to ask whether a story is "true."[60]

She goes on to comment that those facts that are omitted, included, and implied shape a story, potentially transforming it from "true" to "false."[61] Keeping in mind that the line between truth and falsehood is a fuzzy one,[62] the Article considers the Justices' objections to cameras at the Supreme Court and explores the truth—or other motivations—behind them. To the extent that the Justices' arguments against cameras are in fact fish in a barrel, just waiting to be speared, the Article questions whether the Justices' versions of the truth are important enough to the institution's legitimacy to continue to prevent the access that most Americans believe should be a default position.[63]

In listening to and reflecting on the Supreme Court's stories—both the stories the Court thinks it is telling and the stories Americans claim to be hearing—we must consider not only the narrators but the audience. Storytelling theory stresses contemplation about both how the story affects the listener and how the storyteller relates to the listener.[64] It is theoretically imperative for an audience first to recognize that a story is being spun, a narrative adopted; next, to deconstruct the underlying stories; and finally, to view these stories critically. Why? Because storytellers have agendas in selecting narratives they adopt; it is no doubt true that the Supreme Court carefully considers the story that it wants the public to hear.[65]

60. Edwards, *supra* note 56, at 913. In addition to being constructed through language, our reality is also constructed through ritual, symbolism, physical structures, and institutional practices, as this Article will continue to explain.

61. *Id.*

62. In fact, there may well be no true "line," but rather different versions of "truth" that come together to form a meta-truth.

63. *See supra* notes 20–25 and accompanying text.

64. Gewirtz, *supra* note 46, at 6 ("[A] sophisticated account of storytelling in law or legal scholarship must take account of the complex relationship between storyteller and listener. Storytelling . . . can undoubtedly provoke new understandings and engagement from listeners. But storytelling . . . can also divide teller from listener; drive the listener away in annoyance, fatigue, or disbelief; or leave the listener silent and unwilling to respond.").

65. Other institutions tell stories, too. Consider, for example, the college catalog, or the company prospectus. Professor Margaret Somers might call this concept institutional "narrative identity." *See generally* Margaret R. Somers, *The Narrative Construction of Identity: A Relational and Network Approach*, 23 THEORY & SOC'Y 605 (1994).

In fact, as Peter Brooks has remarked,

> [S]torytelling is a moral chameleon, capable of promoting the worse as well as the better cause every bit as much as legal sophistry. It can make no superior ethical claim. It is not, to be sure, morally neutral, for it always seeks to induce a point of view. Storytelling, one can conclude, is never innocent. If you listen with attention to a story well told, you are implicated by and in it.[66]

And as Linda Edwards adds, "The more able we are to notice that we are standing within a story, indeed, that we are characters in that story ourselves, the more able we will be to ask what that story omits. We could ask whether there are other, more complete stories . . . ."[67]

1. The Oracle at Delphi: a referential story

> *"The Oracle was famous for her obscure pronouncements. That was understandable, since no ordinary mortal could withstand the direct communications of the gods, most especially those of radiant Apollo. Only the Oracle had the strength. And only she could put the blinding truth in ways that mortals could understand."*[68]

Narrative theory does not require comparison to a particular story; even so, some scholars have explored legal and institutional narratives by finding embedded references to well-known myths and tales. For example, Professor Linda Edwards has compared the petitioner's brief in *Miranda v. Arizona* to a classic birth story and the respondent's brief in *Bowers v. Hardwick* to a rescue story.[69]

Not all of the stories the Supreme Court tells call to mind particular stories, but the overarching mystical and aristocratic theme of the Court's narrative is reminiscent of a tale familiar to anyone schooled in mythology.[70] The story is an ancient one, one that has been legendary since ancient Greek civilization called on a plethora of gods to help solve any number of societal problems. Speaking to one of the most powerful

66. Peter Brooks, *The Law As Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 46, at 14, 16.

67. Edwards, *supra* note 56, at 915 (footnote omitted).

68. WILLIAM J. BROAD, THE ORACLE: ANCIENT DELPHI AND THE SCIENCE BEHIND ITS LOST SECRETS 56 (2006).

69. *See generally* Edwards, *supra* note 56.

70. More recently, the same story has become legendary in geological and archeological circles, as scientists have sought to explain the mythical drugged-like behaviors of the Oracle. *See* John R. Hale et al., *Questioning the Delphic Oracle*, SCI. AM., Aug. 2003, at 67, 73.

of these gods—Apollo, "the god of order[,] [restraint, and rationality], the spiritual force who helped forge the bonds of civilization"[71]—was Pythia, the Oracle at Delphi.

The Oracle at Delphi was a woman, a human one, who answered questions presented by Greek countrymen, many of whom traveled many hundreds of miles to line up and pose their queries to her.[72] As Pulitzer Prize winner William Broad has described,

> [T]he questions that supplicants brought to Delphi in the early centuries of its recorded history tended to deal with the most serious matters of state: war and peace, law codes and land allotment, duty and leadership, crime and punishment, famine and colonization. Her reputation was that good. . . . [E]specially in the early days [as opposed to later on], the questions tended toward the momentous.[73]

In fact, Broad notes, "The seriousness of the Oracle's petitioners is exemplified by how they sought advice on framing constitutions, especially for a polis that became synonymous with social order and iron discipline."[74] Socrates himself listened to the Oracle's prophecies proclaiming him to be the wisest of men and tried to decode them, "understand[ing] the oracle to contain a message not only about wisdom but also about how he should conduct himself in the future. . . . [For Socrates] [w]hat [began] as an effort to shed light on the oracle's meaning . . . end[ed] up . . . a mission at once religious, philosophical, and civic."[75]

Indeed, Broad explains,

> The Greek world came to recognize the Delphic Oracle and her priests as teachers of an enlightened morality, an early manifestation of what we might call humanism. . . . [S]he called for such social innovations as reverence for oaths, respect for human life, and the importance of developing an inner sense of right and wrong. . . . [F]or the ancient

71. BROAD, *supra* note 68, at 40–41.

72. The petitioners usually drew lots to see who would get to ask the Oracle her questions first, but "[i]n special cases, an esteemed visitor representing an important city-state would be granted precedence in consultation [with the Oracle]." BROAD, *supra* note 68, at 36–37.

73. *Id.* at 43; *see also, e.g.*, Hale, *supra* note 70, at 67 ("Generals sought the oracle's advice on strategy. Colonists asked for advice before they set sail for Italy, Spain and Africa. Private citizens inquired about health problems and investments.").

74. BROAD, *supra* note 68, at 44.

75. David D. Corey, *Socratic Citizenship: Delphic Oracle and Divine Sign*, 67 REV. POL. 201, 213 (2005) (citing PLATO, THE APOLOGY (Thomas G. West & Grace Starry West trans., Cornell Univ. Press 1998)).

> world, it was a reformulation of the unwritten codes of human affairs, seeking to improve all kinds of behavior outside the bounds of state law and local custom.[76]

And, while the Oracle's pronouncements started off simple and easy for the populace to understand, they became more complicated and ambiguous over the centuries, requiring the priests and petitioners to interpret her responses, hopefully in a way that would result in their being "correct."[77] But this vagueness may have in fact been helpful to creating a democratic civilization, as Broad has noted:

> Delphic ambiguity and equivocation, though undermining the idea of miraculous oracular powers, at times proved quite beneficial to the rise of Greek civilizations by forcing consultant states to rehash their questions and debate possible outcomes and courses of action. Oracular vagueness, as it were, worked to foster a Delphic agenda that at times sought to encourage democracy.[78]

The Oracle had a secret sanctum—the adyton—where she went to consider the questions petitioners had presented to her through priests, where she called on Apollo for answers.[79] There, she breathed sweet fumes that inspired her.[80] No one save the Oracle was allowed in the sanctum.

But the Oracle was not always available. She took four months off every year, winter months when Apollo was "absent" from Delphi.[81]

Over the centuries, the Oracle's grip on the Greeks faded, just as Greece faded as the cornerstone of civilization. No longer was it the case that "[w]hatever the priestess at Delphi said would happen infallibly came to pass."[82]

2. The Oracle as a metaphor for the Supreme Court

The parallels between the Court's narrative and the story of the Oracle are so numerous and obvious that many legal scholars have drawn

76. BROAD, *supra* note 68, at 47.

77. *Id.* at 54.

78. *Id.*

79. *See, e.g.*, Hale, *supra* note 70, at 67.

80. *See, e.g.*, J. Foster & D. Lehoux, *The Delphic Oracle and the Ethylene-Intoxication Hypothesis*, 45 CLINICAL TOXICOLOGY 85, 85 (2006); Hale, *supra* note 70, at 68 (citing Plutarch as saying that the fumes (called pneuma) smelled sweet and put the Pythia in a trance).

81. BROAD, *supra* note 68, at 40.

82. EDITH HAMILTON, MYTHOLOGY 375 (2d ed. 1942).

overt or implied comparisons between the two.[83] Anthony Amsterdam, for example, noted forty years ago:

> [T]he role of the Pythia, or priestess of the Oracle at Delphi, was of incomparable grandeur and futility. This young maiden was periodically lashed to a tripod above a noisome abyss, wherein her God dwelt and from which nauseating odors rose and assaulted her. There the God entered her body and soul, so that she thrashed madly and uttered inspired, incomprehensible cries. The cries were interpreted by the corps of professional priests of the Oracle, and their interpretations were, of course, for mere mortals the words of the God.
>
> . . . .
>
> To some extent, this Pythian metaphor describes the Supreme Court's functioning in all the fields of law with which it deals.[84]

In discussing legal realism, Judge Richard Posner has also referred to the Oracle myth in describing the job of judging. He said:

> [J]udges are oracles, applying law found in orthodox legal sources to the facts of new cases, such as statutory or constitutional text or judicial decisions having the status of precedent, and doctrines built from those decisions. They are transmitters of law, not creators, just as the Oracle at Delphi was the passive transmitter of Apollo's prophecies. The analogy of judge to oracle was Blackstone's. He argued that even common law judges were oracles, engaged in translating immemorial custom into legal doctrines rather than engaging in legislating doctrines. The modern idea of the judge as analyst shares with the idea of the judge as oracle the assumption that legal questions always have right answers: answers that can be produced by transmission from an

83. *See, e.g.*, Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 910 (2008) ("Assuming that changes in the make-up of the Court do not lead to a retreat from *Massachusetts v. EPA*, the implication seems to be favorable for state legislation on the subject—though the sparse Supreme Court caselaw on foreign affairs preemption and its somewhat Delphic pronouncements definitely leave uncertainty about the ultimate outcome."); Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 2 n.2 (2008) ("The decision in *United States v. Klein*, 80 US (13 Wall) 128 (1872), did invalidate a statute phrased in jurisdictional terms, but the Court's Delphic ruling is best understood as holding that Congress may not use jurisdictional regulation to require the Supreme Court, or any federal court, to decide a case in violation of the Constitution.").

84. Anthony G. Amsterdam, *The Rights of Suspects*, *in* THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 401, 401–02 (Norman Dorsen ed., 1971), *cited by* Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 814 n.107 (2011).

> authoritative source, though in the modern view the transmission is not direct but is mediated by analysis.[85]

We can look to the Oracle myth to frame the story the Court seems to tell: one of an institution that receives the law from on high,[86] one that communicates to an audience who has no role but to listen and act accordingly. Both the storyteller in and the listeners to the Court's mythical narrative would agree (at least publicly) on a common goal: one of transforming the Court's story from a mythical and aristocratic one to a democratic one. For underneath the Justices' courtly robes, behind the proverbial curtains, there are real people making critical decisions that affect other real Americans. Far from all-knowing wizards, the Justices are human beings—yes, smart and capable human beings—but human beings nonetheless, imbued with all of the shortcomings "ordinary" people possess. And because our governmental decision makers are themselves fallible individuals, most would agree that it is important for American citizens to understand how their government works.[87]

In the sections that follow, this Article will use narrative theory to identify the stories being told and being heard about cameras in the Supreme Court; situate the Justices, the public, and television cameras as characters in the story; and identify what the Supreme Court's story about cameras omits.

III. THE STORY THE COURT CURRENTLY TELLS

> *"The Supreme Court is the last American institution that has any claim to the word 'exalted'. Everything about it—from the marble walls to the black judicial robes—is designed to proclaim the majesty of the law. The bronze doors each weigh six-and-a-half tons. Television cameras*

85. Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 578 (2011); *see also* Richard A. Posner, *Some Realism About Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177, 1177–78 (2010) [hereinafter *Some Realism About Judges*] (using very similar language).

86. Many would refer to this view of the law as "natural law." *See generally, e.g.*, CONTEMP. PERSPECTIVES ON NATURAL LAW (Ana Marta Gonzalez ed., 2008).

87. *See, e.g.*, *Financial Services and General Government Appropriations for 2011 – Supreme Court: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 111th Cong. 91 (2010) (statement of Breyer, J. in response to a question by Rep. José E. Serrano (NY)) ("The 10th-graders are the ones that I really like to talk to about [the Court's work] because it helps them understand what we do."). *But see* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK 2, 143–44 (2002) (interpreting political science research to say that "[r]ather than wanting a more active, participatory democracy, a remarkable number of people want . . . stealth democracy. . . . [T]he people want democratic procedures to exist but not to be visible on a routine basis" but noting that preferences for political involvement vary considerably).

are banned. The message is clear. These are not ordinary men (and [women]). They are philosopher kings bent on divining the meaning of the law. It is easy to poke holes in this mythology. The court moves with the spirit of the times—first endorsing slavery and then embracing civil rights. The justices are all too human with strong prejudices."[88]

A. The Court's Rituals

Social scientists have commented on how ritual and symbolism—at the Court, black robes, blotter paper, and investiture ceremonies—serve to establish hierarchy and power,[89] commenting, "[W]hen one sees that ritual is a type of social action . . . one can uncover in ritual a rich network of symbolic meaning."[90] Professor Jerome Bruner has commented, "[N]arratives . . . accrue, and, as anthropologists insist, the accruals eventually create something variously called a 'culture' or a 'history' or, more loosely, a 'tradition.'"[91] In considering the Supreme Court's story of mysticism and aristocracy, then, it is important for us to consider how the Justices appear to the public, as well as how their traditions and rituals invest them with power and create a story of mystique.

Some scholars have called the Justices "high priests."[92] The term is an interesting one, harkening as it does to images not only of the Oracle of Delphi, but of royalty of some kind.[93] The Justices wear black robes[94]

88. *The Supreme Court: Their Majesties*, ECONOMIST, June 2, 2007, at 98.

89. *See, e.g.*, DAVID I. KERTZER, RITUAL, POLITICS, AND POWER 8 (1988) ("Living in a society that extends well beyond our direct observation, we can relate to the larger political entity only through abstract symbolic means. We are, indeed, ruled by power holders whom we never encounter except in highly symbolic presentations.").

90. Peter A. Winn, *Legal Ritual*, 2 LAW & CRITIQUE 207, 214 (1991).

91. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 18 (1991).

92. *See, e.g.*, Ran Hirschl & Ayelet Shachar, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 CARDOZO L. REV. 2535, 2535 (2009) (citing SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988)); Miller, *supra* note 3, at 154 ("To some extent, Americans are a nation of Constitution-worshippers, with the Supreme Court acting as a high priesthood administering to the faithful.").

93. See *infra* notes 123–45 and accompanying text, for a discussion of the Supreme Court building as a "palace."

94. *See The Court and Its Traditions*, U.S. SUP. CT., http://www.supremecourt.gov/about/traditions.aspx (last visited Jan. 23, 2013). While Chief Justice William Rehnquist adopted four gold stripes on his sleeves to signify his role as Chief, Chief Justice Roberts has not continued the tradition because he felt he had to "earn [his] stripes." *See, e.g.*, Interview by Crawford Greenburg with John G. Roberts Jr., Chief Justice, U.S. Supreme Court, ABC Nightline News, in Miami, Fla. (Nov. 28, 2006), *available at*

and appear to the public from behind red velvet curtains on prescribed days at exactly 10:00 a.m.[95] Before they take the bench, each Justice shakes hands with each of the others.[96] The Justices sit on the bench in the order of seniority, with the Chief in the center seat and the Associate Justices to his right and left.[97] Each Justice has a leather chair purchased especially for her.[98]

Each court session begins with observers standing to the Marshal's chant of "Oyez, oyez,"[99] and continues with the announcement of orders and opinions,[100] followed by the ceremonial[101] admission of new attorneys to the Supreme Court bar,[102] concluding with (on scheduled argument days) oral arguments exactly one hour each in length.[103]

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http://abcnews.go.com/Nightline/story?id=2661589&page=12. Some have commented that the Justices all wear black robes to form a visual whole, representing the institution and the rule of law. *See, e.g.*, Mason, *supra* note 57, at 1387 ("Nine black-robed Justices conjure up the image of equal justice under law, saving us from both the tyranny of the multitude and the arrogance of personal government."). Some Justices feel that the robe should have transformative qualities. *See, e.g. id.* at 1400–01 (quoting the view of Frankfurter J. on donning the robe: "Does a man become any different when he puts on a gown[?] I say, if he is any good, he does."). *But see id.* at 1401 n.80 (quoting Justice Ferdinand Pecora of the 1937 New York Supreme Court who said that the robe does not and should not "transform" a person).

95. *See Visitor's Guide to Oral Argument*, U.S. SUP. CT., http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last visited Jan. 23, 2013).

96. *See The Court and Its Traditions*, U.S. SUP. CT., http://www.supremecourt.gov/about/traditions.aspx (last visited Jan. 23, 2013).

97. *See id.*

98. *See* Lisa McElroy, *The Senate Vote in Plain English*, SCOTUSBLOG (Aug. 4, 2010 4:35 PM), http://www.scotusblog.com/2010/08/the-senate-vote-in-plain-english/.

99. KENNETH JOST, THE SUPREME COURT A TO Z 307 (5th ed. 2012); *see also Visitor's Guide to Oral Argument*, *supra* note 95 (explaining that "[t]he Marshal . . . call[s] the Court to order").

100. Interview by C-SPAN with John G. Roberts Jr., Chief Justice, U.S. Supreme Court, in D.C. (June 19, 2009) [hereinafter C-SPAN Roberts interview], *available at* http://supremecourt.c-span.org/assets/pdf/JRoberts.pdf.

101. It is ceremonial only because every motion in open Court to admit attorneys to the Supreme Court bar is granted.

102. C-SPAN Roberts interview, *supra* note 100.

103. *See id.* All arguments are exactly one hour long except in rare cases when the Court grants a motion for additional argument time. For example, the Court granted a total of five and one half hours in the "health care cases." Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 604 (2011) (ordering "[a] total of two hours . . . allotted for oral argument on Question 1 [and] [o]ne hour . . . allotted for oral argument on the additional question"); Florida v. Dep't of Health & Human Servs., 132 S. Ct. 604 (2011) (granting certiorari and ordering the standard one-hour time allotment for oral argument); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011) (ordering "a total of 90 minutes . . . allotted for oral argument"). Other examples of the Court's ordering additional argument time include FEC v. McConnell, 539 U.S. 912 (2003) (ordering "a total of four hours . . . allotted for oral argument"), INS v. Chadha, 454 U.S. 1077 (1981) (ordering "an additional thirty

When meeting together to decide cases, the Justices sit in their Conference Room, where they also sit and speak in order of seniority.[104] In the Supreme Court dining room, each Justice sits in the chair of the Justice she replaced on the Court.[105]

To become a Justice on the Supreme Court, a Justice must be nominated by the President.[106] Such a nomination in recent years has been accompanied by a formal announcement[107] and introduction of the nominee to the public.[108] After the nomination, the nominee endures days of largely ceremonial Senate confirmation hearings before she becomes a member of the Court in an investiture ceremony.[109] After swearing two oaths, she sits in the chair once used by Chief Justice John Marshall[110] and walks down the front steps with the current Chief Justice.[111]

The Justices meet to decide cases in a conference room used primarily for that purpose.[112] No one, not even a messenger or a law clerk, is allowed to enter the room when the Justices are in conference.[113] The junior Justice is assigned to hand out notes or receive

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minutes . . . allotted for oral argument"), and Buckley v. Valeo, 423 U.S. 820 (1975) (ordering "a total of four hours allotted for oral argument to be evenly divided between appellants and appellees").

104. *See Visitor's Guide to Oral Argument*, *supra* note 95.

105. *See Virtual Tour of the Justices' Dining Room*, C-SPAN, http://supremecourt.c-span.org/Video/VirtualTour/SC_VT_JusticeDiningRoom.aspx (last visited Jan. 23, 2013).

106. *See* U.S. CONST. art. II, § 2, cl. 2.; *see also Supreme Court Oath Taking Procedure*, U.S. SUP. CT., http://www.supremecourt.gov/about/oath/oathsproceduresinfosheet2009.aspx (last visited Jan. 23, 2013).

107. At least, the announcement is intended to be formal. In perhaps the most memorable of these announcement ceremonies, however, Jack Roberts (the then four year-old son of nominee and eventual Chief Justice John G. Roberts, Jr.) dropped his mother's hand and pretended to be Spiderman, perhaps humanizing the otherwise stilted nomination speech.

108. John Anthony Maltese, *Speaking Out: The Role of Presidential Rhetoric in the Modern Supreme Court Confirmation Process*, 25 PRESIDENTIAL STUD. Q. 447, 448–49 (1995).

109. DENIS S. RUTKUS, CONG. RESEARCH SERV., RL31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 23 (2010). Of course, not all confirmation hearings are pro forma. Consider, for example, the confirmation hearings for Justice Clarence Thomas, which became a spectacle in light of allegations by Anita Hill that the nominee had sexually harassed her. See Richard Berke, *The Thomas Confirmation; Women Accusing Democrats of Betrayal*, N.Y. TIMES, Oct. 17, 1991, http://www.nytimes.com/1991/10/17/us/the-thomas-confirmation-women-accusing-democrats-of-betrayal.html?pagewanted=all&src=pm.

110. *See* McElroy, *supra* note 98.

111. *See id.*

112. *See* JOST, *supra* note 99, at 121.

113. *See, e.g.*, *id* at 253.

messages; Justice Breyer held this post for eleven years.[114] The Justices sit in order of seniority around the conference room table, with the Chief at the head;[115] each seat includes supplies, including blotter paper, a long-standing tradition.[116]

Political anthropologists understand that rituals help to create power structures.[117] As Professor Peter Winn has noted, "The power of ritual in general depends on its ability to create, order, and structure human social institutions."[118] Following up on that thought and applying it to monarchies and coronations,[119] Professor Norman Bonney has said, "The oaths of accession and of the coronation of the monarch are the central affirmative symbolic acts that legitimate the system of government of the United Kingdom . . . and the place of the monarchy at the apex of the political and social system."[120] And scholars have long recognized that law, itself, bears similarities to and even contains rituals.[121]

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114. *See* ANTONIA FELIX & SONIA SOTOMAYOR: THE TRUE AMERICAN DREAM 252 (2010).

115. C-SPAN Roberts interview, *supra* note 100.

116. E-mail from Kathleen Arberg, Pub. Info. Officer, U.S. Supreme Court (Nov. 4, 2011) (on file with author).

117. *See, e.g.*, KERTZER, *supra* note 89, at 8.

118. Winn, *supra* note 90, at 209–10.

119. The application to monarchies and coronations is relevant because a coronation bears many similarities to an investiture, including sitting on a throne. *See, e.g.*, Mason, *supra* note 57, at 1386 (quoting *Hearings on S. 1392 Before the S. Comm. on the Judiciary*, 75th Cong., 1st Sess. 233 (1937)) ("Americans find in the Supreme Court a sense of security not unlike that instilled by the British Crown. . . . Excepting the Constitution itself, the Supreme Court is 'the country's greatest symbol of orderly, stable, and righteous government.' Like a queen on a throne, it stirs interest and imagination, and creates in the citizen profound respect and confidence. But there is a difference . . . The Court is both symbol and instrument of authority. The American counterpart of the British throne has real power; the Supreme Court can bring Congress, President, state governors and legislators to heel.").

120. Norman Bonney, *The Evolution and Contemporary Relevance of the Accession and Coronation Oaths of the United Kingdom*, 13 BRIT. J. POL. & INT'L REL. 603, 603 (2011).

121. *See, e.g.*, Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI-KENT L. REV. 1182, 1182 (2005) ("[L]ike ritual, law is part of the essential constitution of human societies—a set of shared understandings about how political power is to be allocated among, and exercised by, the members of a given social organization."); Winn, *supra* note 90, at 215–30 (describing, *inter alia*, will executions and court pleas as legal rituals).

B. The Court Building

"Places, like people, have personalities."[122]

Visitors to the Supreme Court of the United States are immediately taken by the building's majesty[123]—in fact, the building was designed to be a "temple,"[124] and it is often called the "Marble Palace."[125] The building was built to impress[126] and mysticize,[127] situated on a hill,[128]

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122. Harold H. Burton & Thomas E. Waggaman, *The Story of the Place: Where First and A Streets Formerly Met at What Is Now the Site of the Supreme Court Building*, 51 HIST. SOC'Y OF WASH. D.C., 138, 138 (1952).

123. The word "majesty" is often used to describe the Court and the law that it makes or interprets. *See, e.g.*, SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE (2003); David C. Dziengowski, *Return to Sender: Responses to Professor Carrington, et al. Regarding Four Proposals for a Judiciary Act of 2009*, 21 STAN. L. & POL'Y REV. 349, 366 n.133 (2010) (calling the building "majestic").

124. For references to the Supreme Court building as a temple, see, for example, Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1403 (2006) ("[C]onsider the building that the Supreme Court meets in, which is designed to look like a Greek temple with religious friezes and the words 'Equal Justice Under Law' emblazoned across the front of it. Surely, that temple is a national, modern day St. Peter's Basilica for the American secular religion. Is it any accident that when the Supreme Court 'hands down a ruling' (as God handed down the Ten Commandments), all the television networks display the facade of the Supreme Court building to show the sacred source of the new decree?") and C-SPAN Roberts interview, *supra* note 100 ("[T]he Supreme Court building is distinctive . . . immediately, as soon as you see it, you appreciate that this is something different. It represents that the Court is a different branch of the government, and it really is more monumental . . . . And if you view it as something of a temple of justice, I think that's entirely appropriate.").

125. *See supra* note 40 and accompanying text.

126. Chief Justice Taft, who commissioned architect Cass Gilbert to design the first Court building, told him that it should be "a building of dignity and importance suitable for its use as the permanent home of the Supreme Court of the United States." *See The Court Building*, U.S. SUP. CT., http://www.supremecourt.gov/about/courtbuilding.aspx (last visited Jan. 23, 2013); *see also* Geoffrey Blodgett, *Cass Gilbert, Architect: Conservative at Bay*, 72 J. AM. HIST. 615, 632 (1985) ("The architect would have preferred a more spacious site on Capitol Hill to ensure the building's autonomous grandeur. Proximity to Congress and its library required a building big enough to assert its importance in no uncertain terms.").

127. *See* Blodgett, *supra* note 126, at 635–36 ("Gilbert spent his career designing buildings to house the institutions he believed sustained a good society with a desirable future—capitols for the states of a federated nation . . . for his last great commission in Washington[, the Supreme Court], he fashioned decorative symbols to verify the power and integrity of his clients' behavior. His architecture . . . was intended to foster believable myths about its users."); Corey Field, *Did Napster Save Copyright? A Proposal to Amend Section 511 of the Copyright Act Using* A&M Records v. Napster *to Solve the Supreme Court's Eleventh Amendment Abrogation Riddle*, 48 J. COPYRIGHT SOC'Y U.S.A. 633, 646 n.48 (2001) ("All three branches of the federal government do their work within Greek and Roman revival 'temples' (the Supreme Court building; the United States Capitol; the White House) whose symbolic homage to classical civilization goes beyond mere architecture to evoke the political systems, philosophy, and drama of classical civilization."). While still a

with forty-four steps[129] leading up to a grand façade, sixteen marble columns across the front,[130] "monumental bronze doors at the top of the . . . steps"[131] stretching seventeen feet high,[132] a Great Hall designed to make the entrance to the courtroom vast and dramatic,[133] and a courtroom made of marble and rising forty-four feet high.[134] The bench where the Justices sit is elevated.[135] The ceilings are heavily decorated.[136] The Justices' chambers are removed from the public spaces.[137]

As it currently stands, the Court is represented almost entirely by a physical building; Americans have to go to the Court, because the Court does not come to them.[138] What story does the Court building tell? It tells visitors that they are entering a place where serious business occurs, certainly. But it also tells a formal story, a story about seriousness of a type extending beyond dignity to intimidation.[139] It tells visitors that,

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professor, Felix Frankfurter referred to the new building as the "Temple of Karnak" in a letter to Justice Harlan Stone. Lotte E. Feinberg, *Mr. Justice Brandeis and the Creation of the Federal Register*, 61 PUB. ADMIN. REV. 359, 360 n.1 (2001).

128. *See, e.g.*, Burton & Waggaman, *supra* note 122, at 138.

129. *See, e.g.*, Robert Barnes, *Supreme Court Closes Its Front Doors to the Public*, WASH. POST (May 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/03/AR2010050302081.html; *see also* Barbara A. Perry, *The Israeli and United States Supreme Courts: A Comparative Reflection on Their Symbols, Images, and Functions*, 63 REV. POL. 317, 326 (2001) (describing the approach to the Supreme Court's front entrance as a "vertical climb").

130. *See The Court Building*, *supra* note 126.

131. *See id.*; *see also* David Mason, *The Supreme Court's Bronze Doors*, 63 A.B.A. J. 1395 (1977).

132. *See, e.g.*, Mason, *supra* note 131.

133. *See* Perry, *supra* note 129, at 319. I also observed this during an in-person tour of the Court on October 21, 2011.

134. *See The Court Building*, *supra* note 126.

135. *See id.* I attended oral argument in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), argued on Oct. 30, 2001. Because the September 11 attacks had just occurred and the Court was then involved in an anthrax scare, arguments were held at the D.C. Circuit, where the bench was not elevated. I and other observers noted to each other that the feel of the argument was very different because the bench and the Justices were at floor level.

136. I observed this ornamentation during an in-person tour of the Court on October 21, 2011.

137. *See* Blodgett, *supra* note 126, at 632 ("[Gilbert's] plans . . . provided justices with maximum privacy and isolation from the public, thus enforcing the ritual mystery of their movements and the oracular nature of their judgments.").

138. For a discussion of audio broadcasting of oral arguments, see *infra* notes 162–68 and accompanying text.

139. *See, e.g.*, Perry, *supra* note 129, at 321 (noting that modern judicial architecture is very different; "the by-words are informal, modern and efficient"); *see also id.* (describing the then-new federal courthouse in Boston as "appropriately weighty and grand . . . . Yet . . . also open and

somehow, they are below the Justices who work there, even positioning them there, seating them below the Justices in the courtroom and thereby making visitors feel small in relation to the grandeur of the Great Hall and the height of the courtroom. The front door of the Court is now closed as an entrance,[140] and even visitors who climb the steps are unable to access the Court through the most visible doors, telling a story of inaccessibility.[141] It perpetuates the falsehood that the Justices are fully outside of the political process,[142] with apparently no need to reach out to the American public, as members of the executive and legislative branches do.[143]

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inviting" (quoting Benjamin Forgey, *A Courthouse that Acquits Itself Well*, WASH. POST, Oct. 3, 1998, at C1, C5)); *id.* at 322 ("The courthouse visibly expresses the solemnity, dignity, and *openness* of the American judicial system." (emphasis added) (quoting *Federal Courthouses Win NEA Recognition*, 32 THIRD BRANCH, June 2000, at 6, 6)).

140. While visitors could enter through the building's front door for the first seventy-five years of the building's history, the Court made the decision to close the front door of the Court as a visitor entrance on May 3, 2010. Press Release, U.S. SUP. CT. [hereinafter *Front Entrance Press Release*] (announcing the closing of the Supreme Court Building's front doors), http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_05-03-10.html. The public now enters through side doors. *Id.* Justices Breyer and Ginsburg published a memo dissenting from the decision to close the front entrance, citing symbolic concerns about public access. Stephen Breyer & Ruth Bader Ginsburg, *Statement Concerning the Supreme Court's Front Entrance*, 2009 J. SUP. CT. U.S. 831, 831–32, *available at* http://www.supremecourt.gov/orders/journal/jnl09.pdf. Justice Kennedy is also on record as viewing the closing of the front door as regrettable. *See Financial Services and General Government Appropriations for 2006: Hearings Before the Subcomm. on Transp., Treasury, HUD, Judiciary, D.C., and Indep. Agencies Appropriations of the H. Comm. on Appropriations*, 109th Cong. 219 (2005) (statement of Kennedy, J.) ("There is something important about coming up the steps.").

141. Note that visitors can still access the building, but through side doors virtually hidden from view under the steps. *See Front Entrance Press Release*, *supra* note 140.

142. The Justices' view (at least their public one) is not widely shared among those outside the Court. *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279 (1957) ("To consider the Supreme Court of the United States strictly as a legal institution is to underestimate its significance in the American political system. For it is also a political institution, an institution . . . for arriving at decisions on controversial questions of national policy."); *see also* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 260 (Sanford Levinson ed., 5th ed. 2010) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 734–35 (2011) ("[A]fter appointment, . . . Justices are subject to ongoing political control by the political branches and the public, which possess the power to coerce or marginalize a judiciary that seriously interferes with the agenda of a dominant national coalition.").

143. VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 5 (2003).

C. The Court's Visitors Policies

> *"[P]roponents of cameras in the courts might contend that you can't really ask citizens to participate meaningfully in deciding critical matters of law if you secretly suspect they aren't smart enough to watch and understand legal proceedings in the first place."*[144]

Through its visitor policies, the Court tells a similar story to the one conveyed through the building's architecture. By limiting public access to days and times when most Americans would be in school or at work, the Court seems to say that visitors might visit and see the government at work only at the convenience of those in charge. It's a story about control: we, the Court (through the dictates of the Justices) will only allow you, the public, in to see our work at times we prescribe.[145]

The Supreme Court's visitor policies are of little help for those who seek to learn the "real" Supreme Court story firsthand. The Supreme Court building, for example, is open to the public only during the workweek, and then only from 9:00 a.m. to 4:30 p.m.[146] It is not open on

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144. Dahlia Lithwick, *Public Enemies: How the Supreme Court Managed to Insult Both the Law and the Public*, SLATE (Jan. 16, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/public_enemies.html.

145. The story of inaccessibility is only enhanced by at least one Justice's public statements about visitors to the Court. Take, for example, Justice Thomas's answer to a question from Representative José R. Serrano (NY). Implying that keeping the public out would be better for the Court's work, Justice Thomas stated:

> I think we have [accomplished easier visitor access to the building]. I think we can always debate around the margins, as to whether or not this approach or that is a better approach. . . . [The Supreme Court building] is a national treasure, but it is also a building where we work. . . . Also on the web site, I think, is an opportunity to see more of the building. . . . Just the ability to show what is there without actually having the physical intrusiveness or disturbances that you would have [from visitors] is outstanding.

Financial Services and General Government Appropriations for 2011: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations, 111th Cong. 88–89 (2010). Compare Justice Breyer's answer to a follow-up question from Representative Serrano, disagreeing politely with Justice Thomas:

> We had at one point, I think, about a million people a year coming through. I think that is good. I think the number has dropped a lot because of the construction probably, and I hope to get back to a million or more. I think it is important that people go through that building. It is their building, and they ought to know about it.

Id. at 89.

146. *See Plan Your Visit*, U.S. SUP. CT., http://www.supremecourt.gov/visiting/visitorservices.aspx (last visited Jan. 23, 2013) (listing visiting hours). By comparison, the U.S. Capitol Visitor Center is open similar hours, but it is open on Saturdays and on some federal holidays. *See Plan a Visit*, http://www.visitthecapitol.gov/ (last visited Jan. 23, 2013).

federal holidays or on weekends, when many potential visitors might have time off from work or school to visit.[147]

The Court's current system for giving the public access to oral arguments is similarly limited. The Court allows members of the public to attend oral arguments in person at the Supreme Court in Washington, D.C., either for an entire hour or for three minutes.[148] As the Court itself notes, however, "Visitors should be aware that cases may attract large crowds, with lines forming before the building opens."[149] In fact, the Court's disclosure that "large crowds" often attempt to attend an oral argument is something of an understatement; arguments in less visible cases often fill the courtroom,[150] while those in headliners may result in lines of literally hundreds of people on the plaza at One First Street NE,[151] with lines beginning to form very early in the morning or even the day before.[152]

Americans visiting the Supreme Court of the United States must sometimes stand in line all night in the cold to see our government at work[153]—an image and a story brought to life by a recent article in the

147. *See Plan Your Visit*, *supra* note 146.

148. *See Visitor's Guide to Oral Argument*, *supra* note 95. According to the Court's spokesperson, "The Court allots a minimum of 50 seats for the public, but that number depends on how many Bar admissions groups and other groups are attending oral argument. Twenty seats are typically reserved for the rotating three-minute public line and the Court seats all members of the public who are in the three-minute line. The Court does not track the number of people who line up to attend oral argument." E-mail from Kathy Arberg, *supra* note 116; *see also* Wendy Kaminer, *Cameras in the Supreme Court*, THE ATLANTIC (Nov. 5, 2010), http://www.theatlantic.com/national/archive/2010/11/cameras-in-the-supreme-court/66183 ("Supreme Court arguments are nominally public, but courtroom space is quite limited; only a miniscule number of people will ever see or hear the Court at work, in person.").

149. *Visitor's Guide to Oral Argument*, *supra* note 95.

150. Telephone interview with Michael Sacks, Supreme Court Reporter, Huffington Post, Founder, First One @ One First (July 26, 2011) (transcript on file with the author).

151. When there are long lines, the Supreme Court police begin handing out placeholders at 7:30 a.m., with arguments to begin at 10:00 a.m. *Id.*; E-mail from Kathy Arberg, *supra* note 116. Note that, according to Arberg, "The Court does not track the number of people who line up to attend oral argument." *Id.*

152. *See, e.g.*, Adam Liptak, *Tailgating Outside the Supreme Court, Without the Cars*, N.Y. TIMES (March 3, 2010), http://www.nytimes.com/2010/03/03/us/03line.html. Indeed, according to Michael Sacks, during the 2009 and 2010 Terms, the line for "big" cases stretched all the way around the corner onto East Capitol Street and included two or three hundred people two or three abreast. Interview with Michael Sacks, *supra* note 150. For the less publicized cases, the courtroom was still filled, with friends of the parties usually taking the first places in line and then tourists taking up the rear. *Id.*

153. *See* Kenneth W. Starr, Op-Ed, *Open Up High Court to Cameras*, N.Y. TIMES, Oct. 3, 2011, http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras.html.

New York Times.[154] And this is just the people who are able to make it to Washington, D.C., on a morning during the work and school week, during times when most people have other obligations.[155] For the vast majority of people who live in other parts of the country[156] or who work or go to school full-time,[157] attending a Supreme Court argument is not possible, at least not more than once or twice a lifetime,[158] a reality reflected by the decreasing number of in-person visitors to the Court.[159]

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154. *See* Liptak, *supra* note 152 (describing the experience of "15 enthusiastic and energetic students from Monta Vista High School in Cupertino, Calif., [who] arrived not long after 7 p.m. [the night before a major argument]" and explained, "It was like a camping trip, except with concrete and civics").

155. The Court holds oral arguments on Mondays, Tuesdays, and Wednesdays at 10:00 a.m., two weeks each month between October and April. Occasionally, the Court also hears arguments in the afternoons on these same days. *See Visitor's Guide to Oral Argument, supra* note 95. By means of contrast, visitors may access the House and Senate galleries whenever those bodies are in session. *See Watching Congress in Session*, U.S. SENATE, http://www.senate.gov/visiting/common/generic/new/watching_congress.htm (last visited Jan. 23, 2013).

156. According to the Washington, D.C. tourism board, nine of the top ten hometowns for visitors are on the East Coast, with all of the top five (Washington, D.C., New York City, Richmond, Baltimore, and Philadelphia, in that order) located within a few hours' drive of the capital. *See* DESTINATION DC, WASHINGTON D.C.'S 2009 VISITOR STATISTICS 13 (2009), http://planning.washington.org/images/marketing/2009_Visitor%20Statistics_FINAL.pdf. Eighty percent of visitors to the District come from fourteen states, all but two east of the Mississippi. *See Corporate and Convention Info: Research and Statistics*, DESTINATION DC, http://beta.washington.org/planning/press-room/corporate-and-convention-info/research-and-statistics (last visited Jan. 23, 2013) ("Fourteen states supply 80% of all visitors to the District: Massachusetts, New York, New Jersey, Pennsylvania, Ohio, Michigan, Maryland, Virginia, North Carolina, Georgia, Florida, Illinois, Texas and California."). For another comment on the geographical incompatibility of visits to the Court for most Americans see Starr, *supra* note 153.

157. For example, black firefighters from Chicago stood outside the Court in the pre-dawn hours to hear arguments in February, 2010 in *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010). *See* Mike Sacks, *Vox Populi: The Lewis Line*, ABA J. (Feb. 26, 2010), http://www.abajournal.com/news/article/vox_populi_the_lewis_line/. Similarly, members of Hastings Law School's Christian Legal Society waited all night in April, 2010, to hear arguments in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), a case involving their organization. *See* Mike Sacks, *First One @ One First: Fortune from Miscalculation*, ABA J. (Apr. 20, 2010), http://www.abajournal.com/news/article/first_one_one_first_fortune_from_miscalculation1.

158. More visitors visit Washington, D.C., from out of town in April and July than in any other months. *See* WASHINGTON D.C.'S 2009 VISITOR STATISTICS, *supra* note 156, at 9. The Court holds oral arguments in April, but not in July. *Id.* Accordingly, 47% of D.C. visitors are in the District during months when no oral arguments take place (May, June, July, August, and September). *See id.* Additionally, 70% of overnight leisure visitors to Washington, D.C between 2006 and 2009 were there for the first time. *Id.*

159. *See Financial Services and General Government Appropriations for 2008: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. 18 (2007) (statement of Kennedy, J.) ("Before 9/11, we had about 890,000 visitors a year. We then went down to about 200,000. We are now up to just over 300,000, part of that is because of the disruption of the construction both in our Court and in the Visitors

Making the "majesty" and "inaccessibility" narratives even more persuasive may be the fact that—according to Court procedures—members of the Supreme Court bar (who are presumably more familiar with the Court and its workings) are afforded much easier entry to oral arguments.[160]

It is true that there are other means by which ordinary Americans may access Court information. For example, the Court releases audio of all oral arguments at the end of each week (as well as same-day transcripts of the arguments),[161] presumably in an effort to educate the public.[162] But that system of allowing citizens to listen to Supreme Court arguments has some shortcomings.

Center on the east steps.").

160. Members of the Supreme Court bar line up for seats at argument in a separate line from the general public. *See Visitor's Guide to Oral Argument, supra* note 95. A separate section of the courtroom (nearer to the bench) is reserved for them. *Id.* To become a member of the Supreme Court bar, a person must have been admitted to the bar of at least one state and remained in good standing for three years or more. *See Instructions for Admission to the Bar*, U.S SUP. CT., http://www.supremecourt.gov/bar/barinstructions.pdf (last visited Jan. 23, 2013). The policy giving preference to members of the Supreme Court bar for admission to arguments may reflect some Justices' views—whether conscious or subconscious—that lawyers (not the general public) are the Court's primary "audience." *See, e.g.*, *Financial Services and General Government Appropriations for 2006: Hearings Before the Subcomm. on Transp., Treasury, HUD, Judiciary, D.C., and Indep. Agencies Appropriations of the H. Comm. on Appropriations*, 109th Cong. 226 (2005) (statement of Kennedy, J.) ("[L]aw professors, and lawyers who specialize in federal work, go to their offices every morning and hit our Web site."). Note that Justice Kennedy's comment appears not to involve even all lawyers, but those at a particular level of practice or engaged in scholarly endeavors.

161. *See Arguments Transcripts*, U.S. SUP. CT., http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx (last visited Jan. 23, 2013).

162. In fact, the release of all audio during the term is a recent development. In the past, the public could only hear the audio for a few "big" cases, so determined by the Court itself. Typically, audio in those cases would be released on the same day as the oral argument. *See, e.g.*, *Press Release*, U.S. SUP. CT. (April 2, 2003), http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_04-02-03.html (announcing the 2003 same-day release of the audiotape of the oral arguments in the University of Michigan affirmative action cases, *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003)). Prior to October 2010, audio for the preceding Term's arguments would become available at the National Archives only at the start of the following Term. *See* Press Release, U.S. SUP. CT. (Sept. 28, 2010), *available at* http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-28-10.html. But in October 2010 the Court began releasing audio of all Supreme Court oral arguments. *Id.* This decision was reportedly in response to the Chief Justice's discomfort over being in a position to choose what was newsworthy and what was not. *See* Ruth Marcus, Op-Ed, *Public Is Zero for Seven at the Supreme Court*, POSTPARTISAN, WASH. POST (Apr. 15, 2010), http://voices.washingtonpost.com/postpartisan/2010/04/public_is_zero_for_seven_at_th.html (speculating that "[p]erhaps the court doesn't want to be in the position of deciding which cases rise to the level of heightened public importance").

First, the audio is available only on websites, at least one of which the public may not easily find.[163] There the recordings are listed only by the name of the case, in chronological order, and with no annotation;[164] while someone familiar with the Court and its docket could therefore find a case of interest quite easily, the same would not be true for a more casual Court observer. Second, the audio recordings do not identify the Justice speaking.[165] Certainly, a listener could download the transcript for a particular case and then follow along with the audio to identify the questioners, but it would seem to be quite a "restrictive means"[166] (in Supreme Court parlance) to require those interested in the Court's work to go through such a long process. Third, because the audio is not available until the end of the week, a citizen who hears about a case through the news media on the day it is argued—again, on a Monday, Tuesday, or Wednesday—must wait until the end of the week to hear the case argued.[167] At any rate, it would be hard to assert that listening to an argument is the same approximate experience as seeing one; part of the fascination with the Supreme Court, for many, is actually seeing the Justices in their robes, on the bench, in front of the velvet curtains—the story the Court has perpetuated about its majesty.

IV. THE RISKS OF ALLOWING OTHERS TO TELL THE STORY

Were the Court to allow Americans into that experience, such a strategy could solve one problem identified by political scientists: the Court's failure to "frame" its decisions, "leaving the articulation of its

163. Audio of arguments can be found on the Supreme Court's website:, *Arguments Audio,* U.S. SUP. CT., http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited Oct. 23, 2012), or through the Oyez Project online, *Cases*, OYEZ, http://www.oyez.org/cases (last visited Oct. 23, 2012), a website that the public may not find easily.

164. *See Arguments Audio, supra* note 163.

165. The transcripts do identify the speaker, although they did not prior to 2004. Timothy R. Johnson et al., *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments,* 55 LOY. L. REV. 331, 337 (2009); *Arguments Audio, supra* note 163. The audio recordings identify the attorneys speaking, but usually only when the Chief Justice calls them to the podium (unless a Justice asking a question uses the attorney's name in doing so). *See id.*

166. *See, e.g.*, Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2985 (2010); F.C.C. v. Fox, 129 S. Ct. 1800, 1834 (2009).

167. Some have speculated that the audio is not available until the end of the week precisely so that it would not be broadcast by news agencies during the week; by the time the audio is released on Friday afternoon, it is likely that many have moved on to the next story. *See, e.g.*, Tony Mauro, *Supreme Court Will Release Argument Audio on Delayed Basis*, THE BLT: THE BLOG OF THE LEGAL TIMES (Sept. 28, 2010, 2:30 PM), http://legaltimes.typepad.com/blt/2010/09/supreme-court-will-release-argument-audio-on-delayed-basis.html.

policy vulnerable to the framing of others . . . the press and television play[ing] an especially influential role."[168] As these researchers have found, the media source framing information about the Court influences public support for the institution's policy decisions, "even when the policy in question is articulated by a source with the credibility of the Supreme Court."[169] As the Court's iconic reporter, Linda Greenhouse, has said: "[I]t is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society."[170]

Because the Court does not explain its opinions and other work to the public in ordinary English, the media must do so. As veteran Supreme Court reporter and law professor Stephen Wermeil has noted, "fostering the public's understanding of [the Court's] independence is not a regular part of the Court's daily routine. One significant answer to this dilemma is that the public learns of the actions of the United States Supreme Court through the news media."[171] The media presumably has different interests—namely, attracting readers and viewers[172]—than does the Court, leading to what may well be a skewed portrait of the Justices and the caseload.[173] The media often reports, for example, on criticism

168. Rosalee A. Clawson & Eric N. Waltenburg, *Support for a Supreme Court Affirmative Action Decision: A Story in Black and White*, 31 AM. POL. RES. 251, 252 (2003) (citing to studies demonstrating that the press and television are the "main sources of public knowledge about the Court and its policy pronouncements"); *see also Financial Services and General Government Appropriations for 2009: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. 103 (2008) (statement of Rep. José Serrano (NY)) ("Justice Kennedy, the TV people would like you to move the microphone a little closer. And you know, that is the real power in this society."); Rorie L. Spill & Zoe M. Oxley, *Philosopher Kings or Political Actors? How the Media Portray the Supreme Court*, 87 JUDICATURE 22, 23 (2003) ("The substance, and potential impact, of a major Court ruling is well known . . . . Equally important, though, is how these rulings are disseminated to or filtered for the public, since public perceptions of decisions may affect the reservoir of support for the Supreme Court.").

169. Clawson & Waltenburg, *supra* note 168, at 270 (finding that "[t]he effect of the Court's credibility on support for its policy outputs is moderated by the manner in which those outputs are constructed"); *cf.* Jeffery J. Mondak, *Policy Legitimacy and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RES. Q. 675, 689 (1994) (reporting on a study finding that "the content of media coverage does not affect media legitimacy to the same extent as does source credibility").

170. Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1538 (1996).

171. Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059, 1064 (1998).

172. Spill & Oxley, *supra* note 168, at 24.

173. *See* Mondak, *supra* note 169, at 678.

of decisions but not the reasoning, at least in depth,[174] leading readers to form somewhat uninformed opinions about a particular case or about the Court more broadly.[175] What's more, the media generally declines to report on Supreme Court cases involving issues deemed to be less interesting to the general public, focusing on cases involving the First Amendment and civil rights.[176] Researchers have found that newspapers rarely explain the Court's decision-making process, the impact that a case might have, or the other cases that ought to contextually be considered with it.[177]

To put it plainly, the media reports on what will interest the public,[178] often telling a story of a Supreme Court that is more political even than it actually is[179] and more "interesting" than the average case

174. Spill & Oxley, *supra* note 168, at 24, 27.

175. *See* Mondak, *supra* note 169, at 679.

176. *See, e.g.*, Spill & Oxley, *supra* note 168, at 23, 28 ("Scholars have consistently found that coverage does not reflect the full complement of the Court's docket. Compared to their proportion of the Court's caseload, civil rights and First Amendment cases receive more media coverage, while cases regarding economic and business matters receive less. This misrepresentation of the Court's docket is present in newsmagazine, newspaper, and television news stories. . . ."); *see also* Jerome O'Callaghan & James O. Dukes, *Media Coverage of the Supreme Court's Caseload*, 69 JOURNALISM Q. 195, 202 (1992) (recognizing that in some medias, cases about economics will have more coverage than cases concerning the First Amendment and civil rights, but explaining that this is only because there are more of the former type than the latter type and that the latter type receive more coverage per case that the former type); Spill & Oxley, *supra* note 168, at 26 (finding that the average number of cases covered by newspapers studied in the 1998 Term was 15 out of 145, or 11%, with major networks covering only 7.6%). Still, media coverage serves to increase awareness more in "less salient cases." Kevin M. Scott & Kyle L. Saunders, *Supreme Court Influence and the Awareness of Court Decisions* (2006), http://www.kevinmscott.com/apsa06.pdf (paper prepared for presentation at the 2006 Annual Meeting of the American Political Science Association, Philadelphia, PA.).

177. Spill & Oxley, *supra* note 168, at 24.

178. In response to some criticisms, Stephen Wermiel has said:

> In my view, even reporting that focuses too much on the personalities of the justices, or that too heavily emphasizes the view of the Court as a political institution, or that misinterprets the legal significance of the Court's actions, or that pays too much attention to the results of cases and too little to the process and reasoning, adds to public understanding of and, ultimately to public respect for the Supreme Court.

Wermiel, *supra* note 171, at 1066.

179. According to Professors Spill and Oxley, the journalistic slant may depend on who is covering the Court—a regular member of the Supreme Court press corps or a generalist. Spill & Oxley, *supra* note 168, at 24, 29.

may be. Moreover, at least one Justice has commented that his concerns about cameras are that they might misinform rather than educate.[180]

V. TRANSFORMING THE STORY THROUGH CAMERAS AT THE SUPREME COURT

> *"The justices' resistance [to cameras at the Supreme Court] was understandable. For the justices, allowing television coverage was not merely about the placement of a camera at a discreet location in the courtroom. Rather, such coverage represented the collapse of their strategy of placing public attention on their products—their written opinions—rather than on themselves. . . . [E]ven worse, regular television broadcasts of the Court's public sessions would magnify public awareness of the justices as individuals."*[181]

In resisting cameras at the Supreme Court, the Court purports to be concerned about the legitimacy of the institution, about telling a story about a Court that exists only as a single institution, not one comprised of individual Justices.[182] It seems to reject legal realism by presenting the Justices as "passionless vehicles for the enunciation of 'The Law'"[183]—a vehicle much like the Oracle at Delphi.

The parallels between the Supreme Court and the Oracle are obvious and numerous: both make their pronouncements from a temple on a hill; both are perceived, at least metaphorically, as deities or holies; both make pronouncements based on sources not available to listeners. Moreover, both the Supreme Court and the Oracle answer questions

180. *See Supreme Court Justice Scalia Gives Civics Lesson*, GEO. U. BLUE & GRAY (Oct. 21, 2006), http://web.archive.org/web/20090102175446/http://explore.georgetown.edu/news/?ID=19322 (statement of Scalia, J.) ("If I thought cameras in the Supreme Court would really educate the people, I would be all for it. But I think it would miseducate and misinform.").

181. RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA 29–30 (2011).

182. Interestingly, other federal courts of last resort have not perceived threats to their legitimacy sufficient to prohibit cameras. For example, the courts in Britain and Canada allow cameras. Lithwick, *supra* note 28. According to the Canadian Chief Justice, cameras have not been an issue. Tony Mauro, *3 Women on the High Court, and You Missed It*, USA TODAY ONLINE (Oct. 5, 2010, 6:05 PM), http://www.usatoday.com/news/opinion/forum/2010-10-06-column06_ST1_N.htm [hereinafter *3 Women*] (reporting on a statement by Chief Justice Beverley McLachlin). The same has been true of state supreme courts, forty-three of which allow television broadcasts. Leo Strupczewski, *State High Court May Televise Oral Arguments*, LEGAL INTELLIGENCER (Mar. 29, 2012), http://www.post-gazette.com/pg/10354/1111551-499.stm (quoting Pennsylvania Supreme Court Chief Justice Ronald D. Castille as saying about a trial run with cameras in the courtroom, "I had them move one of the cameras, because it would have blocked my view and another justice's view. But after that, we hardly noticed.").

183. Miller, *supra* note 3, at 173–74.

critical to society's sense of order and well-being; both retreat to a secret sanctum, and later emerge with answers to these questions. Finally, both seem to be ambiguous at times, making statements that beg for interpretation but which become the word from on high.

But that narrative is a mystical one, one more grounded in the morality of natural law than one based on democracy and legal realism.[184] The American public is intelligent, interested in participatory government, even, perhaps, willing to learn about the mysterious third branch if given a chance. The American public is engaged in a democratic enterprise. In order to change the rhetoric around the Court from mythicism to realism, from majesty and aristocracy to democracy, something must change.

Were average Americans to have access to the Supreme Court, the Court's narrative would necessarily morph. Cameras at the Supreme Court would allow the public to decide on the story it perceives, rather than having that story filtered through and interpreted (perhaps sensationally) by the media.[185] Were the American public to have the opportunity to see the Court—part of its own government—it could form educated opinions about the legitimacy of the Court as an institution.[186] And, with a peek inside the Court's building, a look at what the Court does, the public would be less likely to reject or accept the Court wholesale and more likely to view it in shades of gray. If we think of the Justices as the Greeks did of the Oracle, as quasi-gods, the disciples (the American public) have only two choices: to believe or not to believe. But if the Justices are human decision makers, ordinary people can be more accepting of their imperfections, without causing the institution to lose its support. As Chief Justice Berger said, "People in an open society do

184. *See Some Realism About Judges*, *supra* note 85, at 1177–78.

185. Cameron Stracher, *Who's Afraid of Cameras in the Courtroom?*, WALL ST. J., July 2, 2010, at W9 (commenting that courtroom artists' sketches can come across as inaccurate cartoons).

186. *See, e.g.*, Joel Campbell, *Time to Pull Back Supreme Court Curtain*, SALT LAKE TRIB. ONLINE (Mar. 30, 2012, 4:57 PM), http://m.sltrib.com/sltrib/mobilemobileopinion/53826565-183/court-arguments-justices-courtroom.html.csp (commenting on the health care arguments: "Transparency equates to credibility. But the esteemed justices often turn that on its head, believing somehow that keeping a false sense of decorum equates to better decisions. . . . In a famous U.S. district court decision, a judge wrote that 'democracy dies behind closed doors.' In this case, democracy was on life support when only those who could fit in the court and overflow rooms really got to witness the top tier of the judicial branch in action. . . . [T]he courtroom this week became a venue for elitism and arrogance.").

not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[187]

Government transparency has been an important theme in American civics for as long as the Republic has been in existence. One of the most famous declarations of the importance of openness was penned by James Madison and is inscribed on that building of the Library of Congress that bears his name. This declaration reads: "A popular government without popular information or the means of acquiring it, is but a Prologue to Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance and a people who mean to be their own Governours, must arm themselves with the power knowledge gives."[188]

A. Other Benefits of Telling a Democratic Story

A democracy is essentially a story of citizens' success in self-governance. Cameras could transform the Court's story from a mystical one to a democratic one by allowing the public to see stories play out, stories of ordinary Americans who have reached the Supreme Court because of the Court's commitment to "Equal Justice Under Law."[189] Watching a Lily Ledbetter[190] bring her case in court to protest discriminatory pay could help ordinary people understand that—in a democratic system—everyone has access to justice. It is here that Americans could see themselves as characters in the story, or at least potential characters, average people who might themselves enter the temple one day.

And, through broadcasting more than just oral arguments, cameras could tell a more complete story. Allowing the public to watch opinion announcements could bring home the power of dissent[191]—even

187. *See* 105 CONG. REC. H2250 (daily ed. Apr. 23, 1998) (statement of Rep. Chabot).

188. ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 24 (2007).

189. The Court's motto, engraved over the front entrance to the building. *See Visitor's Guide to the Supreme Court*, U.S. SUP. CT. (Sept. 8, 2012), http://www.supremecourt.gov/visiting/visitorsguide-supremecourt.aspx.

190. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). Even more compelling in a case like Ledbetter's, would be the public's more nuanced understanding of a petitioner's eventual victory in the passage of a new law in response to the Court's decision against Ledbetter based on statutory text. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

191. Oliver Wendell Holmes, after all, was called the "Great Dissenter," signifying the value of dissent. *See, e.g.*, William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 429 (1986).

vociferous oral dissent[192]—as a part of the democratic story in which every person has a voice and a right to speak, even to disagree, and publicly.[193] Critical to this telling of the story is that cameras might be the *only* way most Americans could access the Justices' words in oral dissent; as Lani Guinier has pointed out, what a Justice chooses to say in Court may be simpler, easier to understand, and more emphatic than what he writes in his dissenting opinion.[194]

Also critical to democracy and to seeing government at work may be the public's participation in great stories of transformation. Whereas the Supreme Court was once comprised of nine white men, it is now far more diverse, with three women (one Hispanic) and an African-American man among the Justices. Yet, as staunch-camera supporter and longtime Supreme Court reporter Tony Mauro has commented, the public has not been permitted to take part in the diversity story as participants, even celebrants. As Mauro said on the opening day of the 2010 Term:

> When the Supreme Court convened . . . three of the nine justices who emerged from behind the marble columns to take their seats were women—the first time ever that the court's membership has included that many women at once. But you only read about it. You did not see it, unless you were among the 250 or so people lucky enough to secure a seat inside the court that morning. . . . When was the last time such a symbolic public event was so invisible? . . . [The Court] should have let the people in to see history in the making.[195]

Justice O'Connor was similarly wowed by the presence of three women on the Supreme Court: "It was absolutely incredible. . . . I just think that the image that Americans overall have of the Court has to change a little bit when they look up there and see what I saw."[196] And yet the American public cannot look up there and see what Justice

192. *See, e.g.*, Lani Guinier, *The Supreme Court 2007 Term: Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 8–9 (2008) [hereinafter *Foreword*] (describing Breyer, J.'s oral dissent in *Parents Involved in Cmty. Sch. v. Seattle School District No. 1.*, 551 U.S. 701 (2007)).

193. *See* Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539, 540–41 (2009) (describing Justice Ginsburg's oral dissent in the *Ledbetter* case and her statement, not only to the other Justices, but to women across America). Of course, virtually all of the women to whom Justice Ginsburg "spoke" had no way to hear her, as the Court does not release audio or transcripts of opinion sessions.

194. *See, e.g.*, *Foreword*, *supra* note 192, at 8–9.

195. *3 Women*, *supra* note 182.

196. *Educating the Public*, Kennedy Presidential Library and Museum Dec. 13, 2010), http://www.c-spanvideo.org/program/297057-1.

O'Connor saw, because no mechanism currently exists to bring that image of humanity and diversity to people not present at the Court. That kind of education, of regular Americans working hard, struggling together to make difficult decisions, is integral to a society that values democratic participation.[197]

Of course, there may be no better example than that of the health care arguments in the spring of 2012, when only about 250 public seats were available to those who wanted to watch history in the making.[198] Even those seats were largely only obtainable by those with money (who paid line holders by the hour to stand in line for public seats) or connections (who called upon friends in the Court, including the Justices' chambers, to reserve them seats).[199] The line for public seats began outside the Court sixty hours before the arguments began; some

197. *See, e.g.*, Strupczewski, *supra* note 182 (quoting Pennsylvania Supreme Court Chief Justice Ronald D. Castille as saying that tapes of high court sessions would be useful "educational tools for the public and law school students"); *see also* MOLLY TREADWAY JOHNSON & CAROL KRAFKA, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 24 (1994) (reporting that judges in the pilot program felt that education for the public was the greatest benefit of cameras in the courtroom). *But see* Justice Antonin Scalia, C-SPAN *Q & A* (July 29, 2012), http://www.c-span.org/Events/Justice-Antonin-Scalia-on-QA/10737432588/ ("I am sure [cameras at the Court and resulting soundbites] will miseducate the American people.").

198. Most sources count only about 250 public seats; some count as many as 400. *See, e.g.*, Erwin Chemerinsky & Eric J. Segall, *Supreme Court Should Lift Its Blackout*, L.A. TIMES (Mar. 22, 2012), http://articles.latimes.com/2012/mar/22/opinion/la-oe-chemerinsky-cameras-supreme-court-20120322 ("Who will get to witness this historical event? Only the justices, the lawyers, a few reporters and 250 lucky individuals whose tenacity and financial ability will allow them to camp out in front of the court – perhaps for days – before the hearing begins . . . . We should be outraged by this decision. Supreme Court proceedings are not simply government events; they are important historic moments and are of major educational, civic and national interest. There is a strong presumption that people should be able to watch government proceedings, and in ones as vitally important as this, the public has an especially great interest in transparency."); *Supreme Court Doesn't Budge on Push for Cameras,* NPR'S WEEKEND EDITION - SUNDAY (Mar. 25, 2012), http://www.npr.org/2012/03/25/149331735/supreme-court-doesnt-budge-on-push-for-cameras, on the lack of access to the landmark health care arguments ("Susan Stanberg: Only those lucky enough to get one of the Supreme Court's 400 spectator seats will be able to watch and hear the health care arguments in real time. That's because the nation's highest court has turned down requests to allow live broadcast of this week's proceedings . . . . Senator Dick Durban: It's not too much to ask the third branch of government at the highest level to share the arguments before the court with the people of America. Understand, there'll be hundreds of people present and watching this as it occurs. It isn't confidential or private. It's only kept away from the rest of America because this court doesn't want America to see the proceedings.").

199. Emmarie Huetteman, *Waiting (and Sleeping) in Line, for View of Health Care History*, N. Y. TIMES ONLINE (Mar. 25, 2012), http://www.nytimes.com/2012/03/26/us/waiting-in-line-to-see-supreme-court-argue-health-law.html.

people therefore slept outside (in the rain) for at least three nights (some more), all to see history in the making.[200]

Cameras at the Supreme Court would not likely change the nature of the institution. But they would allow Americans to engage with their government semi-firsthand instead of through myths and parables, even worship. Cameras would help transform the Court's story from that of Oracle (natural law) view of the Court to a more human (legal realist) view of the Court.

B. The Justices' Narratives

There can be no doubt that the Court has sincere concerns when it comes to granting public access to the Supreme Court, especially through broadcasting of official Court work. Among them are a desire for day-to-day privacy,[201] a concern that allowing cameras or Internet streaming will somehow damage the public's perception of the Court,[202] a fear that broadcasting could somehow subject the Court or the Justices personally to mockery,[203] and a concern that funny or less-than-devout comments made during oral argument might end up on the Internet or on programs like *The Daily Show with Jon Stewart*.[204] It is concerned that televising Supreme Court proceedings would change the very nature of those proceedings.[205]

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200. As one op-ed noted, "this case will have massive effects on health care, individual rights and the balance of governmental powers. If that does not warrant giving Americans a front-row seat for access to a proceeding already considered public, what does?" Editorial, *Health Care Hearings Deserved TV Coverage*, ST. CLOUD TIMES, Mar. 28, 2012, at B5; *see also* Huetteman, *supra* note 199; Lisa McElroy & Mike Sacks, *The Call for Cameras in the Courtroom*, HUFFINGTON POST BLOG (Mar. 26, 2012, 8:00 AM), http://www.huffingtonpost.com/lisa-mcelroy/post_3161_b_1378339.html.

201. *See infra* notes 207–26 and accompanying text (discussing the privacy issue).

202. *See, e.g.*, *Your Reality TV*, N.Y. TIMES, Mar. 14, 2010, at WK7 (reporting on a Farleigh Dickinson University poll finding that only 26% of those polled "believed that cameras would undermine the court's authority and dignity"); *Public Says Televising Court is Good for Democracy*, PUBLICMIND (Mar 9, 2010), http://publicmind.fdu.edu/courttv/.

203. *See infra* notes 259–72 and accompanying text (discussing the embarrassment concern).

204. *See, e.g.*, Warren Richey, *Supreme Court on TV?*, CHRISTIAN SCI. MONITOR (Feb 9, 2012), http://www.csmonitor.com/USA/Politics/2012/0209/Supreme-Court-on-TV-Senate-panel-advances-bill-requiring-cameras-in-high-court ("'I know that some justices are not fans of televising their proceedings,' Senator Leahy said. 'I understand that they do not want to be made fun of through an unflattering video clip or to be quoted out of context. But that happens to the rest of us in public service all the time,' he said. 'It is not particularly pleasant, but it is part of our democracy,' Leahy said."); *see also infra* notes 260–66 and accompanying text (discussing the concern about extraction of sound bites).

205. *See, e.g.*, Tony Mauro, *The Right Legislation for the Wrong Reasons*, 106 MICH. L. REV.

But the question we must ask is whether these concerns add up to a story with a factual basis, or whether they are a fairy tale that the Justices tell Americans—or perhaps that the Justices even tell to themselves. Are the Court's concerns borne out objectivity, or are they instead a part of the story the institution has created (consciously or unconsciously) to justify its refusal to allow the American people virtual and physical access? Are inaccessibility, grandeur, and intimidation the only paths to legitimacy and respect? As Michael Kammen has written, perhaps another story—one of approachability and openness—works equally well to engender confidence in the institution and establish its work as legitimate.[206]

To reach this conclusion, it is important to analyze each of these concerns in turn.

1. The Justices' desire for privacy and anonymity

An important part of the Court's mystique story is wrapped up in anonymity. While some have asserted that "[t]he benefits of celebrity accrue to the justices as individuals rather than to the Supreme Court, or to the public at large in the form of a better understanding of a powerful political institution,"[207] the fact remains that the Justices like their privacy.[208] Many of them relish their relative anonymity and would prefer to remain as unrecognized as possible.[209] In protecting their

FIRST IMPRESSIONS 8, 9 (2007).

206. *See* Michael Kammen, *Temples of Justice: The Iconography of Judgment and American Culture*, *in* ORIGINS OF THE FEDERAL JUDICIARY 276, 276 (Maeva Marcus ed., 1992) ("John Marshall never had a temple of justice to call his own. . . . [C]redible and consensual judgments are far more vital to the integrity of a political culture than its temples of justice–however elegant, however awesome, however austere."); *see also* Perry, *supra* note 129, at 334 ("[Exhibits of Supreme Courts from around the world] inevitably beg the question of whether . . . physical manifestations of judicial power, majesty, independence, and history really matter."); *id.* at 334–35 (citing to polls finding in the mid-1990s that more Israelis had confidence in their Supreme Court than Americans did in theirs, despite the fact that the Israeli Court building is not as grand as the American counterpart).

207. Richard A. Posner, *The Court of Celebrity*, THE NEW REPUBLIC, May 5, 2011, at 23, 26.

208. For example, Chief Justice Roberts is fond of telling about taking walks on the sidewalks around the Court with then-Associate Justice Rehnquist when Roberts was a law clerk. Roberts recounts that many families across the country have photos in their albums taken by the unrecognized Rehnquist because they needed a photographer and he happened to be passing by. *See* John G. Roberts, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 1, 1 (2005).

209. *Financial Services and General Government Appropriations for 2008: Hearings Before a Subcomm. of the Comm. on Appropriations, H.R., Subcomm. on Fin. Servs. & Gen. Gov't Appropriations*, 110th Cong. 31 (2007) (statement of Thomas, J.). ("My concern is for my colleagues. I have already lost my anonymity."); *see also* DAVIS, *supra* note 181, at 30 ("Justices

privacy, the Justices tell a tale about recognition destroying the Court's legitimacy by focusing on the individual players rather than emphasizing the "whole is greater than the sum of its parts" quality of the Court as an institution.[210]

Indeed, the Justices seem to subscribe to the idea that "[s]ome persons and institutions promote their interests less effectively by publicity than by mystique, which is nicely defined . . . as 'an air or attitude of mystery and reverence developing around something or someone.'"[211] The Court's written opinions, the Court believes, should be the institution's communication with the public, not the Justices themselves.[212] With that idea in mind, the Justices have questioned whether increasing attention on them as individuals[213] might diminish

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would become celebrities, particularly in today's celebrity culture. Unlike the print media, where the occasional interaction with print journalists could be masked through background interviews, television offered no such anonymity. Broadcast journalists wanted pictures. A justice interviewed for a television news story, or who actually sat for a fully taped interview, would be publicly identified."); Tony Mauro, *Lifting the Veil: Justice Blackmun's Papers and the Public Perception of the Supreme Court*, 70 MO. L. REV. 1037, 1037 (2005) (telling a story about no one recognizing Justice Harry Blackmun when he attended abortion protests).

210. *See, e.g.*, DAVIS, *supra* note 181, at 194 ("[Will] the change in norms that leads to a greater public presence of the justices . . . affect the Court's legitimacy in the public's mind[?] As the justices become more public, will the institution suffer? The currency for the Court is public legitimacy. In recent years, the justices may have been willing to become more public initially to explain their institution, but are there other ramifications that will deleteriously affect the work of the institution? The conventional wisdom has been that the Court's legitimacy is connected to the continuation of a mystique shrouding the Court."). *But see id.* ("[C]ould televising of oral arguments actually benefit the Court institutionally? . . . [N]ews coverage of the Court has undergone a change toward more coverage of the individual justices. Would oral arguments focus more attention on the cases, and the legal issues they represent, than on the personalities on the bench?").

211. Posner, *supra* note 207, at 24 (quoting MERRIAM-WEBSTER DICTIONARY).

212. *Financial Services and General Government Appropriations for 2009: Hearings Before a Subcomm. of the Comm. on Appropriations, H.R., Subcomm. on Fin. Servs. & Gen. Gov't Appropriations*, 110th Cong. 123 (2008) (statement of Kennedy, J.) ("We teach something by not having televised hearings. We teach that we are judged by what we write and by what we decide. That is a very important lesson."); *see also* DAVIS, *supra* note 181, at 195 ("Emphasis on the image of distance on the part of the individuals, while simultaneously pushing forward the products of the Court (written opinions) has dominated the Court's approach to the press."). *But see* Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2121 (1995) ("[E]ven opinions that are clear and tight will have a limited audience: the legal profession and the press.").

213. Merely examining just who the Justices are as people tells an aristocratic story of its own. Of the sitting Justices today, six attended Harvard Law School (one graduated from Columbia Law School), and three attended Yale Law School. They have been law professors, lower court judges, and Solicitors General. Although some come from humble beginnings, all are currently financially secure and hold their jobs for life. *See Biographies of Current Justices of the Supreme Court*, U.S. SUP. CT., http://www.supremecourt.gov/about/biographies.aspx (last visited Sept. 8, 2012); *Sonia*

the public's respect for the Court itself, as has occurred for other government figures.[214]

Certainly, there are times when the Court must protect the story that it is a single entity, not a collection of individuals. Consider, for example, the unanimity achieved in *Brown v. Board of Education*, unanimity which did not originally exist[215] but which Chief Justice Warren managed to achieve for the sake of making a powerful statement, "throw[ing] the full weight of his office and the prestige of the Court behind a ruling certain to provoke bitter controversy."[216] In fact, the very rule of law may rely upon the public believing in the power of the institution.[217] But we must challenge this story by asking:

> Will the public . . . become less deferential to the Court because of the public profile of the justices? The strategy of the justices through the history of the Court has been to maintain some measure of distance from the public to enhance a sense of mystery and awe toward the institution. By not talking about the Court very much or even placing themselves out in front, the justices hoped to concentrate attention on their products and retain the shroud around themselves and how they arrived at their decisions. 'The product should be transparent, but the process should not be' has been the mantra for maintaining the Court's power.[218]

In an alternate story, the solution to the perception problem could be for the Court and the Justices to reach out to the public more regularly about the role of the judicial branch in our federal government. The Supreme Court could take on this task through its website, and the Justices could make it a point to explain the Court's decision-making

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Sotomayor, TIMES TOPICS, N.Y. TIMES (Mar. 28, 2012), http://topics.nytimes.com/top/reference/timestopics/people/s/sonia_sotomayor/index.html?scp=1-spot&sq=sonia%20sotomayor&st=cse.

214. *See* DAVIS, *supra* note 181, at 195 (citing HIBBING & THEISS-MORSE, *supra* note 87); Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597, 597–612 (2006).

215. ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION 174–77 (2003).

216. Mason, *supra* note 57, at 1402; *see also* JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 313–14 (2006); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS OF THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 8–9 (2004).

217. *See, e.g.*, Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1022 (2004).

218. DAVIS, *supra* note 181, at 195.

process when they speak publicly. In this version of the story, rather than undermining the Court's legitimacy, filming oral arguments gavel-to-gavel would give the public an unbiased view of what the Court does.[219]

But the part of the story that does not add up is the assertion that recognizability of government officials inexorably leads to the crumbling of respect and legitimacy. If that were so, surely they would act truly in secret, much as juries deliberate. They would not be appointed to their positions in a public manner by the President,[220] for example, and confirmation hearings would be sealed.[221]

Because the Justices represent the very helm of the judicial branch of government—a "cornerstone of democracy,"[222] if you will—the Court's proceedings are not materially different from those of the executive or legislative branches, at least not in the sense that they are unamenable to public scrutiny.[223] In fact, another version of the "legitimacy" story might assert that the failure of the public to "monitor the[] [Justices'] job performance"[224] could result in the kind of disbelief that magicians experience—we see one thing, but we know that it is mere sleight of hand. In that version of the story, the Justices, as public officials, would not be able to hide from the public outside (and even inside)[225] the Court building.[226]

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219. *See, e.g.*, Miller, *supra* note 3, at 174 ("Forsaking the mythology of an infallible finder of truth and getting involved in 'politics' and value judgments may . . . result in a substantial diminution of Court prestige. For some, this argues for retaining the myth and keeping the truth from the laity, who in the view of those who espouse the notion do not have the moral and intellectual stamina to withstand knowing that Supreme Court Justices are human. But . . . it is better to know the truth and adjust to it than to be kept in the dark.").

220. Confirmation hearings for Supreme Court Justices have been televised on C-SPAN since 1981, after the nomination of Sandra Day O'Connor. *See Cameras in the Court Timeline*, C-SPAN, http://www.c-span.org/The-Courts/Cameras-in-The-Court-Timeline/ (last visited Sept. 8, 2012). On at least two prior instances, nomination hearings were recorded. In 1939, the Judiciary Committee allowed a news reel coverage of Felix Frankfurter's hearing, and in 1957, CBS was allowed to record a few minutes of William J. Brennan, Jr.'s hearing. DENIS S. RUTKUS, CONG. RESEARCH SERV., SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 21 (2010).

221. Confirmation hearings became more public throughout the twentieth century. Prior to that, proceedings were held in private. Not even the nominee was invited to attend. RUTKUS, *supra* note 220, at 20.

222. Dahlia Lithwick, *Justice Showtime*, 27 AM. LAWYER 130, 128 (2005).

223. *Id.*

224. *Id.* at 130 ("There is no possibility of grandstanding on the part of the justices—they'll keep their jobs whether they are scintillating or soporific."). Lithwick also pontificates that "having a camera trained on [the Justices] might just induce them to work harder." *Id.* at 128.

225. *See, e.g., Department of Transportation, Treasury, HUD, the Judiciary, District of Columbia, and Independent Agencies Appropriations for 2006: Hearings Before a Subcomm. of the*

2. The Court's interest in security

At least one Justice has expressed concerns that a loss of anonymity could compromise the Justices' security.[227] Certainly, one aspect of that argument may have merit: If Supreme Court proceedings were televised the Justices might well become more recognizable.[228]

But caught up in the dialogue about security for the Justices is a compelling emotion surrounding violence against public officials. In fact, we might speculate that "security" is a kind of trigger[229] word, one that calls forth all kinds of reactions based, not in reason, but in emotion or personal experience.[230] The assassinations of President John F. Kennedy[231] and Martin Luther King Jr.,[232] for example, and the 2011

Comm. on Appropriations, 109th Cong. (2005) (statement of Kennedy, J.) ("We like to keep a low profile. We sometimes will walk through the public area of the building, and people do not know what we look like, which is fine.").

226. Lithwick, *supra* note 222 ("Celebrity is the price one pays for scoring a starring role in the life of this nation.").

227. *See, e.g.*, *Department of Transportation, Treasury, HUD, the Judiciary, District of Columbia, and Independent Agencies Appropriations for 2006: Hearings Before a Subcomm. of the Comm. on Appropriations*, 109th Cong. (2006) (statement of Thomas, J.) ("I also think it will raise additional security concerns, as the other members of the Court who now have some degree of anonymity, lose that anonymity . . . I probably have more of a public recognition than any of the current members of the Court, and that loss of anonymity raises your security issues considerably. They don't have that now. I think it will change that for them."); *see also* Tony Mauro, *Poll Shows Support for Supreme Court Cameras*, 241 NAT'L L.J. 4, Mar. 10, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202445941834&slreturn=20120808225942 ("In recent years, security has also been raised as a factor [in the Justices' decision not to allow cameras at the Court], with justices fearing that greater public exposure will trigger more threats against them.").

228. In a 2010 survey asking who was Chief Justice of the Supreme Court, only 28% correctly identified John Roberts while 53% didn't know. *The Invisible Court*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (Aug. 3, 2010), http://pewresearch.org/pubs/1688/supreme-court-lack-of-public-knowledge-favorability. The same study found the court was viewed as increasingly liberal, but this was credited to the fact that most public knowledge of the court is derived from nomination hearings and the most recent nominees were appointed by a Democratic president. *Id.* As Dahlia Lithwick has noted: "[Cameras at the Supreme Court] would invade the justices' privacy. If their faces became famous, they could no longer amble through antique shops unnoticed on summer mornings when the Court is in recess." Lithwick, *supra* note 222, at 130; *cf. id.* at 128 ("[M]y guess is that after David Souter gets used to gaggles of middle-school girls clamoring for his autograph at Safeway, he'll learn to love the exposure, too.").

229. No pun intended.

230. *See, e.g.*, Isabelle Blanchette & Anne Richards, *Reasoning About Emotional and Neutral Materials: Is Logic Affected by Emotion?*, 15 PSYCHOL. SCI. 745, 750 (2004).

231. *See, e.g.*, Tom Wicker, *Gov. Connally Shot; Mrs. Kennedy Safe: President Is Struck Down by a Rifle Shot from Building on Motorcade Route—Johnson, Riding Behind, Is Unhurt*, N.Y. TIMES, Nov. 23, 1963, at 1 (reporting the November 22, 1963, assassination of President Kennedy).

232. *See, e.g.*, Earl Caldwell, *Guard Called Out: Curfew is Ordered in Memphis, but Fires and Looting Erupt*, N.Y. TIMES, Apr. 5, 1968, at 1 (stating that Martin Luther King Jr. was fatally

attack on Representative Gabrielle Giffords,[233] are such a part of the American sensibility that the possibility of violence against our public officials may be paralyzing, at least in the context of informed discourse. Once the Justices raise their concerns about security, therefore (sincere though they may be), it becomes very hard to argue for more public access to the Court and to have a productive dialogue about the implications of restricting that access. In other words, the Court's narrative that cameras at the Court would compromise the Justices' safety registers with us at such an instinctive level[234] that it is extremely difficult (and perhaps even politically inexpedient) for us to deconstruct that story.

But to consider whether the "security" story is fact or fiction, a dialogue would necessarily include a review of the statistics about violence against judges and the effects of recent increased exposure for the Justices. As at least two commentators have noted, increased exposure of the Justices on television and the Internet has not necessarily resulted in higher rates of public recognition of the Justices.[235] In 1970, 22% of the public could name the Chief Justice (then Warren Burger).[236] In 2005, only 6% could correctly identify John G. Roberts Jr. as the Chief Justice of the United States.[237]Furthermore, for several reasons, it is highly unlikely that televising Supreme Court proceedings would increase the amount of targeted violence against the members of the Court.

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shot on the evening of April 4, 1968).

233. *See, e.g.*, Marc Lacey & David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES ONLINE, Jan. 8, 2011, http://www.nytimes.com/2011/01/09/us/politics/09giffords.html?pagewanted=all (reporting the shooting of Giffords and seventeen others near Tucson).

234. Sigmund Freud regarded the instinctual desire for self-preservation as one of the "ego-instincts." 22 SIGMUND FREUD, *Lecture XXXII, Anxiety and Instinctual Life*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 81, 95–96 (James Strachey et al. eds. & trans., 1964).

235. *See, e.g.*, Posner, *supra* note 207, at 26 ("[T]he publicity that Supreme Court justices receive is unprecedented in its volume . . . . [P]ublic knowledge about the Supreme Court is not growing. The benefits of celebrity accrue to the justices as individuals rather than to the Supreme Court, or to the public at large in the form of a better understanding of a powerful political institution."); *see also* DAVIS, *supra* note 181, at 20.

236. DAVIS, *supra* note 181, at 20, 207 (citing a *Newsweek* poll taken on August 4, 1970).

237. *Id.* at 20 (no citation given for statistic). Note that each of these surveys took place one year or less after the Chief Justice concerned became Chief, resulting in an "apples to apples" comparison.

First, the Justices have access to a police detail upon request.[238] The Supreme Court has its own police force under the marshal, and its officers operate much like the Secret Service.[239] "They police the building, grounds, and adjacent streets; they may make arrests and carry firearms. The marshal and his aides also . . . escort the justices to formal functions outside the Court."[240] They even guard the Justices within the Supreme Court building. This security force works around the clock.[241] Moreover, the Supreme Court building is equipped with metal detectors and police officers at all entrances,[242] making it difficult for a potential attacker could bring a weapon into the building. With this kind of protection available, it is implausible that a Justice would have serious security concerns.

Second, photos of all sitting and living retired Justices are featured on the Supreme Court website, making them recognizable to anyone who truly wants to seek them out.[243] In fact, the Supreme Court makes

238. Brendan Koerner, *Who Protects David Souter?: Do Supreme Court Justices Have Bodyguards?*, SLATE (May 3, 2004, 5:18 PM), http://www.slate.com/articles/news_and_politics/explainer/2004/05/who_protects_david_souter.html

239. *See* H.R. REP. NO. 106-931, at 2 (2000) ("Supreme Court Police regularly provide security to Justices by transporting and accompanying them to official functions in the Washington, D.C., metropolitan area, and occasionally outside it when they, or official guests of the Court, are traveling on Court business. Some Justices, because of threats to their personal safety, are driven by the police to and from their homes and the Court every day. Additionally, the police protect Court employees going to and from its parking lot, which is located one-half block east of the Supreme Court building and off the grounds of the Court.").

240. JOAN BISKUPIC & ELDER WITT, THE SUPREME COURT AT WORK 105 (2d ed. 1997).

241. *See Departments of Transportation, Treasury, HUD, the Judiciary, District of Columbia and Independent Agencies Appropriations for 2006: Hearings Before the Subcomm. on Dep'ts of Transp., Treasury, HUD, the Judiciary, D.C., and Indep. Agencies Appropriations of the H. Comm. on Appropriations*, 109th Cong. 215 (2005) (statement of Kennedy, J.) ("[T]he security force [is] there at all times, 24 hours.").

242. 2 ENCYCLOPEDIA OF LAW ENFORCEMENT 885–86 (Larry E. Sullivan et al. eds., 2005).

243. *See Biographies of Current Justices of the Supreme Court*, *supra* note 213 (featuring a photo of each Justice). Of course, photos of the Justices are accessible in innumerable books, on countless websites, and in thousands of newspapers and magazines. *See, e.g.*, LISA TUCKER MCELROY, JOHN G. ROBERTS, JR.: CHIEF JUSTICE (2007) (authorized biography of the Chief Justice which includes official and candid photos supplied by the Court and the Chief Justice); LISA TUCKER MCELROY, SONIA SOTOMAYOR: FIRST HISPANIC SUPREME COURT JUSTICE (2010) (biography of the Justice which includes numerous candid and official photos); JON STEWART ET AL., AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY INACTION 99 (2004) (showing mocked-up photos of the 2004 Court in the nude); *Current Court*, C-SPAN.ORG, http://supremecourt.c-span.org/CurrentCourt.aspx (last visited Sept. 6, 2012) (C-SPAN site showing official photos of the sitting Justices).

official photos of the Justices available to the media,[244] and so a simple query in any search engine will pull up numerous photos of each Justice,[245] most of which portray the subject in regular dress, not in judicial robes.[246] The Court takes an official portrait of the nine Justices together whenever there is a change in membership; this portrait is disseminated to the press.[247] These readily available images of the Justices make them easily identifiable to a person with malicious intent.

Third, the Justices routinely appear in public to make speeches or teach classes, and these appearances are often televised[248] or streamed online, then memorialized on sites like YouTube.[249] Moreover, all of the current Justices' confirmation hearings were televised, as were the Presidents' speeches nominating them and introducing them to the American public.[250] And the Justices willingly take part in television interviews,[251] most notably the 2009 C-SPAN series in which all the then-sitting Justices and retired Justices Sandra Day O'Connor and

244. E-mail from Scott Markley, Pub. Info. Specialist, U.S. Supreme Court, to John Cannan, Law Librarian, Earle Mack Sch. of Law (Sept. 27, 2012, 03:12 EST) (on file with the author).

245. For example, an August 19, 2011, search by the author in Google Images (http://images.google.com) for "Justice Scalia" returned about 103,000 images. Not all of the images were actually of the Justice (strangely, some were of Justice Thomas or Justice Sotomayor, among others), but the vast majority were.

246. Presumably, were someone to seek to attack a Justice, it would not likely be when the Justice was robed and on the bench, but in public in street clothes.

247. *Justice Scalia's Beard Raises Some Eyebrows: New Hirsute at Monday's Opening of the Supreme Court Has Few Precedents*, AUSTIN AMER. STATESMAN, Oct. 8, 1996, at A4.

248. According to a study by Professor Richard Davis, the Justices who served between 1998 and 2007 (Justices Alito, Roberts, Breyer, Ginsburg, Thomas, Souter, Kennedy, Scalia, O'Connor, Stevens, and Rehnquist) appeared on C-SPAN a total of 644 times during that time period. DAVIS, *supra* note 181, at 173. Of course, this number does not include Justices Sotomayor (who took her seat in 2009) and Kagan (who was confirmed in 2010), and it does not include appearances on any other television or cable station, let alone websites. *But see* Tony Mauro, *No Cameras Allowed for Scalia Speech at Duquesne,* BLT: BLOG OF LEGALTIMES (Sept. 23, 2011, 12:04 PM), http://legaltimes.typepad.com/blt/2011/09/no-cameras-allowed-for-scalia-speech-at-duquesne.html (noting that a speech at Duquesne Law School by Justice Scalia would not be videotaped at his request).

249. *See, e.g.*, Yale University, *Future: Will the People Follow the Court?*, YOUTUBE (Mar. 4, 2010), http://www.youtube.com/watch?v=RxyXPd0f18Q (featuring a speech delivered by Justice Breyer).

250. As Professor Davis has noted, "[N]ational media coverage of nominations, particularly live television coverage of confirmation hearings, changed the process from one that was elite driven to one that was mass oriented." DAVIS, *supra* note 181, at 28.

251. *See* Michael McGough, Editorial, *Justices Willing to Be Heard But Still Unwilling to Be Seen in Court*, L.A. TIMES, Oct. 6, 2010, http://opinion.latimes.com/opinionla/2010/10/justices-willing-to-be-heard-but-still-unwilling-to-be-seen-in-court.html (pointing out that the Justices frequently "show their faces" when discussing their books).

David Souter sat down with the cable station for in-depth conversations.[252] Like photo images, these voluntary television appearances (most of which remain online) allow the public to see the Justices—albeit not in their official roles—and serve to make the Justices visibly identifiable to anyone who might seek to attack them.

Fourth, attacks against public officials are few and far between. In fact, only sixteen prominent political figures in our nation's history have ever been the victims of assassination attempts, and only seven of them died.[253] Attacks against federal judges are even rarer; for example, one study found that, over a forty-seven year period, only four federal judges[254] out of the nearly 2000 individuals who held federal judgeships during that time[255] were the victims of targeted violence.[256] Although the same study found that those persons who sought to attack federal judges were more likely to be motivated by a grievance against them than persons who attacked Secret Service protectees like the

252. *See Justices in Their Own Words*, *supra* note 11; *see also* Lithwick, *supra* note 28 (commenting on the fact that the Justices appear on national news, leading members of the public to know more about the Justices as people than as jurists).

253. J. Reid Meloy et al., *A Research Review of Public Figure Threats, Approaches, Attacks, and Assassinations in the United States*, 49 J. FORENSIC SCI. 1, 2 (2004).

254. *See* Robert A. Fein & Bryan Vossekuil, *Assassination in the United States: An Operational Study of Recent Assassins, Attackers, and Near-Lethal Approachers*, 44 J. FORENSIC SCI. 321, 323 (1999) (citing the number of assassinations, attacks, or violent approaches against federal judges between 1949 and 1996).

255. Some of those people held more than one federal judgeship. The number does not include judges who retired from active service but whose commissions were not terminated until after 1949. *Biographical Directory of Federal Judges*, FED. JUDICIAL CENTER, http://www.fjc.gov/history/home.nsf/page/judges.html (last visited Nov. 13, 2011) (including information about judges on the "U.S. District Courts, the U.S. Courts of Appeals, the Supreme Court of the United States, the former U.S. Circuit Courts, and the federal judiciary's courts of special jurisdiction").

256. *But see* LORRAINE H. TONG, CONG. RES. SERV., RL33464, JUDICIAL SECURITY: RESPONSIBILITIES AND CURRENT ISSUES 1 (2008) ("In November 2006, it was revealed that home-baked cookies infused with rat poison had been mailed to all nine Justices in 2005; and, according to the media report, Justice Sandra Day O'Connor was quoted as saying that 'each one contained enough poison to kill the entire membership of the court.'") (citing Kevin Bohn, *O'Connor Details Half-Baked Attempt to Kill Supreme Court*, CNN (Nov. 17, 2006), http://www.cnn.com/2006/LAW/11/17/court.cookies/index.html)). With an incident like this one, however, where all nine were targeted, it could be argued that the incident occurred not as the result of the Justices losing their anonymity, but solely because they were members of the Supreme Court. *See* Mary Meehan, *Justice Blackmun and the Little People*, MEEHAN REP. ON LIFE ISSUES (last visited Sept. 6, 2012), http://www.meehanreports.com/blackmun.html (reporting that while someone shot through the window of Justice Harry Blackmun's home, the FBI concluded that the shot was probably random rather than targeted violence).

President,[257] the number of such attacks was still so small as to be insignificant.[258]

But some will not find the numbers convincing. After all, they might say, the loss of even one life (particularly that of a Supreme Court Justice) is too great, and we should take every possible step to prevent attacks against the Justices. It's a compelling story, and one we should consider. But in that analysis, we need to acknowledge that it is largely a story of the Court's creation, one conceived for benevolent purposes but with the resulting consequences of reduced transparency and accountability.

3. Public embarrassment

The "embarrassment" narrative is another compelling one—who among us does not still blush when remembering a time when we said something silly or uninformed, only to have others learn of it and (perhaps) laugh behind our backs? In making the argument that they do not want to risk embarrassment, the Justices discard the "majesty" narrative—at least in part—and adopt one based on the legal and ordinary concept of the "reasonable person." What reasonable person, after all, would want to be publicly embarrassed?[259] The Justices are human, this narrative pronounces, and they should not be subjected to situations where they might be made to feel self-conscious. And because we too are human, we are asked to be compassionate and understand the Justices' need to do their work without the glare of cameras recording their every move and statement.

257. *See* Fein & Vossekuil, *supra* note 254, at 325. The grievance usually involves an issue involving the judge's role as a member of the judiciary and often relates to a case that the judge has decided against the attacker. *See* Frederick S. Calhoun, *Violence Toward Judicial Officials*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 54, 55–59 (2001) (documenting that all three of the judges killed since 1979 were victims of a person with a case or judge-related grievance against them).

258. Out of 3096 inappropriate communications and contacts between 1980 and 1993, only 3.9% resulted in violence, not always to a judicial official. *See* Calhoun, *supra* note 257, at 63.

259. As one scholar notes, "the [J]ustices' own official actions have led to press and public notice." *See* DAVIS, *supra* note 181, at 32. Certainly, the Justices bring public attention upon themselves for their actions and decisions, both good and bad. *See* Mike McIntire, *The Justice and the Magnate*, N.Y. TIMES, June 19, 2011, at A1 (reporting on friendship between Justice Thomas and real estate magnate Harlan Crow and questioning Crow's financing of a museum project involving the Justice); Robert Barnes, *Supreme Court Won't Be Fully Represented at State of the Union*, WASH. POST, Jan. 25, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/24/AR2011012406917.html (reporting on Scalia, J.'s constitutional seminar to the House Tea Party Caucus).

Like the security narrative, however, the humanity narrative lacks a logical foundation. Why? For one, the Justices have claimed that the real risk lies in the risk of extracted sound bites;[260] the media, they claim, might try to be sensationalistic in choosing what portions to broadcast.[261] Still, that same risk occurs with audio, and while some funny comments from oral argument do hit the airwaves,[262] the media seems to use the publicly available audio to inform rather than to ridicule.[263]

Even were we to accept the premise that the media would perform a 180-degree turn and choose to begin to cast the Justices in a negative light through the use of sound bites out of context, we would still have to buy the part of the story that the Justices are somehow different from other government officials and should therefore be sheltered accordingly. The American public would not accept the President's refusal to appear on television, and citizens are accustomed to watching C-SPAN, which televises Congressional hearings, debates, and votes.[264] Certainly, given

260. *See, e.g.*, Scott C. Wilcox, Comment, *Granting Certiorari to Video Recording but Not to Televising*, 106 MICH. L. REV. FIRST IMPRESSIONS 24, 25 (May 2007), http://www.michiganlawreview.org/firstimpressions/vol106/wilcox.pdf.

261. *See, e.g.*, *id.* And of course, as Dahlia Lithwick pointed out after the health care arguments: "And to those justices who contend they bar cameras from the room because it tempts the participants to act up, to talk in quotable 'snippets,' and to showboat for the audience, I would simply suggest that the absence of cameras this week didn't seem to limit any of it. Indeed if the justices are going to conduct themselves as though they are on a Fox News roundtable, it might be better—not worse—to allow the public to take notice of that fact." Dahlia Lithwick, *Lights! Cameras! It's the Supreme Court!*, SLATE (Mar. 30, 2012, 4:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/obamacare_and_the_supreme_court_the_court_s_arguments_might_as_well_be_on_television_.html.

262. *See, e.g.*, *NPR News: Supreme Court Hears School Strip Search Case*, NPR (Apr. 21, 2009), *available at* http://www.npr.org/templates/story/story.php?storyId=103334943 ("Justice Breyer suggested that it might be seen as normal behavior for adolescents to hide illegal drugs in their underwear. 'When I was 8, or 10 or 12 years old,' he said, 'we changed our clothes all the time for gym.' And then in a grand moment of Supreme Court misspeak, the [J]ustice added, '[P]eople did sometimes stick things in my underwear.' The courtroom exploded in laughter. The [J]ustice blushed.") (internal quotation marks added)).

263. The media chooses to play audio for news purposes less often than one might think. This may be partially because of the short-lived nature of the news and the fact that audio is not released until Friday afternoons, while oral arguments take place on Mondays, Tuesdays, and Wednesdays. Still, Supreme Court reporters (who are not allowed audio equipment in the courtroom) take detailed notes and quote liberally (and precisely) from the arguments on the day they take place or the day after. *See, e.g.*, *NPR News: Supreme Court Takes Up Wal-Mart Bias Lawsuit*, NPR(Mar. 29, 2011), *available at* http://www.npr.org/2011/03/29/134960855/Supreme-Court-Hears-Arguments-in-Wal-Mart-Case; Adam Liptak, *Justices Take Up Crucial Issue in Wal-Mart Suit*, N.Y. TIMES, Mar. 29, 2011, http://www.nytimes.com/2011/03/30/business/30walmart.html?pagewanted=all.

264. C-SPAN (Cable-Satellite Public Affairs Network) is a cable television network and non-

the fact that the activities of the executive and legislative branches are broadcast around the clock on a daily basis,[265] there is more opportunity for embarrassment over hastily or thoughtlessly made comments than there now is for the Justices.[266]

Moreover, the Justices are largely in control of the "embarrassment" story, at least while sitting on panel. The Justices ask questions of advocates, not the other way around.[267] Given the established atmosphere at oral arguments, where advocates are universally deferential to the Justices,[268] the source of embarrassment for the

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profit organization that operates independently from the government. It covers federal government proceedings and other public affairs programming including political events, unedited live coverage of the Congress, congressional hearings, and historical programming. *See About C-SPAN*, C-SPAN.ORG, http://www.c-span.org/About/About-C-SPAN/ (last visited Aug. 31, 2012); *Viewer FAQ*, C-SPAN.ORG, http://legacy.c-span.org/About/Viewer/faq.aspx (last visited Aug. 31, 2012).

265. *About C-SPAN*, *supra* note 264; *Viewer FAQ*, *supra* note 264.

266. *See* Lithwick, *supra* note 222 ("[I]f [cameras] foster bad behavior among senators, they may also promote good behavior among justices. If the justices knew, for instance, that they were being watched by millions of eyeballs, they might be less inclined to giggle among themselves at oral argument.").

267. Justice Harry Blackmun once told the story of arriving as a new Justice at the Court and receiving advice from veteran Justice Hugo Black: "Harry, I'm senior here and you're junior. Never ask many questions from the bench because if you don't ask many questions, you won't ask many foolish questions." *All Things Considered: Supreme Court Justice Blackmun Speaks, Part One*, NPR (Dec. 27, 1993), http://www.highbeam.com/doc/1P1-28001158.html. Of course, today, with the Justices asking an average of 133 questions per argument, that advice may no longer apply. *See* Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES, Feb. 13, 2011, http://www.nytimes.com/2011/02/13/us/13thomas.html; *see also* James C. Phillips & Edward L. Carter, *Source of Information or "Dog And Pony Show"?: Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963–1965 & 2004–2009*, 50 SANTA CLARA L. REV. 79, 157–59 (2010).

268. This has not always been so. Consider, for example, the arguments of Archibald Cox, who was known to be condescending, uniformly arrogant, and snippy. He would even step back from the lectern if a Justice said something that seemed to displease him. *See* E-mail from Lyle Denniston, Supreme Court Reporter, SCOTUSblog, to author (Oct. 26, 2011, 11:25 EST) (on file with author). Today, an argument in which an oral advocate even tells the Justices which papers to have in hand is considered a bit forward. *See, e.g.*, Transcript of Oral Argument at 32, Sorrell v. IMS Health, Inc., 131 S. Ct. 2653 (2011) (No. 10-779), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-779.pdf (Thomas C. Goldstein for the Respondents: "You will want to have available [to] you . . . the red brief of IMS Health, Incorporated, which in its appendix reproduces the statutes and findings."); *see also* James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325, 348 (2010) (analyzing Supreme Court cases from 2005–2008) ("Justice Stevens is the only justice who frequently asks counsel if he can ask them a question (and no attorney ever responded in the negative in the cases analyzed in this study)."); *cf.* Transcript of Oral Argument at 37, Minneci v. Pollard, 132 S. Ct. 617 (2012) (No. 10-1104), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1104.pdf (Justice Scalia: "I

Justices would be statements or questions from the Justices,[269] not from another source. If the Justices are concerned that their impulsive comments or behaviors might be embarrassing or subject to misunderstanding,[270] they can manage that story by, for example, thinking before they speak, or looking at the advocates rather than staring at the ceiling.[271]

Finally, the Justices are arguably less at risk of negative consequences flowing from any embarrassment; after all, they hold their offices for life,[272] meaning that public embarrassment would not result in a job loss. This last fact means that the embarrassment narrative, while deeply felt, has no real punch line; while the concept is initially a believable one, it is unsupported by the type of potential outcome that could make the story resonate.

4. The observation effect

> *"He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation*

certainly wouldn't want to hold that." Attorney Preis: "I'm not surprised that you wouldn't want to hold that, Your Honor.").

269. Such moments are uncommon, but they do occur. *See, e.g.*, Transcript of Oral Argument at 10, Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871 (2011) (No. 09-329), http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-329.pdf (Justice Kagan: "Justice Scalia sort of *snidely*, but I think accurately, described Mead as saying: 'Only when agencies act through "adjudication[,] notice-and-comment rulemaking, or . . . some other [procedure] indicat[ing] comparable congressional intent [whatever that means]" is Chevron deference applicable.'" (alteration in original) (emphasis added)); Transcript of Oral Argument, Davis v. United States, 512 U.S. 452 (1994) (No. 92-1949), http://www.oyez.org/cases/1990-1999/1993/1993_92_1949 (a frustrated Justice O'Connor to a new Justice Ginsburg, who had interrupted her question: "Excuse me, just let me finish, if I may.").

270. *See, e.g.*, Transcript of Oral Argument at 58, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) (No. 08-479), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-479.pdf (reporting Justice Breyer's underwear comment discussed *supra* note 262).

271. *See* Liptak, *supra* note 267 (describing Justice Thomas's typical behavior at oral arguments as asking no questions, but "leaning back in his chair, staring at the ceiling, rubbing his eyes, whispering to Justice Stephen G. Breyer, consulting papers and looking a little irritated and a little bored"); *see also* Posner, *supra* note 207, at 25 ("The justices joke and clown at oral argument; they give the impression, whether or not accurate or intended, that they are playing to the crowd, and they certainly seem to be having a ball.").

272. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .").

> *in which he simultaneously plays both roles; he becomes the principle of his own subjection."*[273]
>
> *"[Black and white film] captures every ounce of character in a person, if you catch them as themselves . . . . [w]hen they're not obsessing about the camera . . . . [w]hich everyone does . . . . [a]ll the time."*[274]

Social scientists have recognized since 1927 that the very act of being observed may materially change behavior and performance.[275] This phenomenon—dubbed the "Hawthorne effect" after the name of the plant where the original experiment took place—has been defined as "the alteration of behaviour by the subjects of a study due to their awareness of being observed."[276] In other words, as the famous story of the experiment goes, at the Hawthorne plant, social scientists learned that when people know that they are being observed, their behavior changes accordingly, usually improving due to an effort to impress observers.[277] This discovery has been paramount in a number of fields: "Outside of the academy, results from the Hawthorne studies bolstered the human relations movement, considerably influenced employee/employer relations, and remain an important influence on the optimal incentive schemes employed in the workplace."[278] And more recent studies also show that when people are observed, their behavior changes.[279]

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273. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 202–03 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

274. MEG WAITE CLAYTON, THE LANGUAGE OF LIGHT 71 (2003).

275. C.E. Snow, *Research on Industrial Illumination: A Discussion of the Relation of Illumination Intensity to Productive Efficiency*, 8 TECH ENGINEERING NEWS 257 (1927) (describing initial research that attempted to prove that more illumination increased worker productivity). Social scientists later determined that the attention paid to the workers during the study rather than change in lighting conditions likely affected the increase in productivity. *See* Steven D. Levitt & John A. List, *Was There Really A Hawthorne Effect at the Hawthorne Plant? An Analysis of the Original Illumination Experiments*, 3 AM. ECON. J.: APPLIED ECON. 224, 229–36 (2011) (statistical analysis of original Hawthorne data).

276. *Hawthorne Effect*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/american_english/Hawthorne%2Beffect?region=us&q=hawthorne+effect (last visited Nov. 15, 2012).

277. Levitt & List, *supra* note 276, at 224, 225, 237 (describing influence of original Hawthorne studies).

278. *Id.* at 237.

279. *See* NICKY HAYES, PRINCIPLES OF SOCIAL PSYCHOLOGY 159 (1993) (reporting faster and enhanced performance of tasks in front of others); PHILIP G. ZIMBARDO & ANN L. WEBER, PSYCHOLOGY 445 (1994) (reporting that the presence of an audience can help or hinder an individual, for example, facilitating performance when engaging in well-learned behavior but disrupting performance when engaging in relatively new and not well-learned behavior); Erol Kohli et al., *Variability in the Hawthorne Effect with Regard to Hand Hygiene Performance in High- and Low-Performing Inpatient Care Unit*, 30 INFECTION CONTROL & HOSP. EPIDEMIOLOGY 222 (2009).

But the Hawthorne effect has been questioned as a mere story for a number of reasons, with most scholars now concluding that the effect is far more subtle and complicated than originally thought.[280] For example, one researcher has commented that observation may increase productivity over the short term, but that workers may become used to being observed and return to working in a normal manner.[281] Others have noted that an analysis of the Hawthorne effect cannot be limited to looking at outcomes, but must also take into account "how [the work environment is changed], by whom, and with what accompanying information, as well as the perceptions of such changes by those directly affected by them."[282]

Still, the Hawthorne (or so-called "observation") effect is an important tool in the Court's arsenal of narratives, in arguments against cameras at the Supreme Court, because some Justices have said that the proceedings would materially change were cameras to enter the courtroom;[283] however, the social science—at least that about cameras in the trial courts—does not support this idea.[284]

280. *See, e.g.*, Levitt & List, *supra* note 276, at 237 ("The illumination studies have been hailed as being among the most important social science experiments of all time, but an honest appraisal of this experiment reveals that the experimental design was not strong, the manner in which the studies were carried out was lacking, and the results were mixed at best. Perhaps fittingly, a meta-analysis of the research testing the enormous body of research into Hawthorne effects triggered by this initial study yields equally mixed results.").

281. *See id.* at 228 (describing various interpretations and applications of the Hawthorne data). We might ask, however, whether this would be the case with the Justices, who would be able to review continually the films of their oral arguments.

282. Frank Merrett, *Reflections on the Hawthorne Effect*, 26 EDUC. PSYCHOL. 143, 146 (2006).

283. Ariane de Vogue, *Cameras in the Supreme Court: Why the Justices Are Skeptical?* (Mar. 16, 2012, 3:54 PM), http://abcnews.go.com/blogs/politics/2012/03/cameras-in-the-supreme-court-why-the-justices-are-skeptical/; *see also* Dan McDonald, *U.S. Supreme Court Associate Justice Kagan Speaks Out*, MASS. LAW. WKLY., Mar. 12, 2012, http://masslawyersweekly.com/the-docket-blog/2012/03/12/kagan-speaks-out/, for Justice Kagan's comments on introducing cameras in the court to record proceedings.

284. *See, e.g.*, JOHNSON & KRAFKA, *supra* note 197, at 25 (finding, inter alia, that judges became more positive about cameras in the courtroom after experiencing them and that judges and attorneys reported little to no effect on proceedings, jurors, or witnesses due to cameras); Eugene Borgida et al., *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 LAW & HUM. BEHAV. 489 (1990) (study finding that cameras in the courtroom did not adversely affect witness performance or juror perceptions about witness testimony); *see also* MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 62–64 (1998) (reporting on the consistency of study findings that cameras did not negatively impact court proceedings).

Another issue detracting from the veracity of the "observation effect" story is that observers—ordinary Americans, lawyers, and members of the media—already attend every Supreme Court argument. How would introducing cameras into the courtroom change the nature of the observation already taking place? Does a visual broadcast change behavior more than an audio broadcast does? More than pen and paper observers (like the media) do? More than live observers in the courtroom do? And, if so, do we care enough about those behavior changes to ban the wider public from observing a Supreme Court proceeding?

Furthermore, a significant number of the Court's cases each Term are argued by members of the professional Supreme Court bar.[285] Because these attorneys build careers and reputations (both within and outside of the building) based on their performance before the Justices, it is unlikely, at best, that cameras would alter their arguments in any substantial ways.[286] While state attorneys general or others running for elected office might showboat a little bit for the cameras and their constituents, attorneys arguing before the Court report that they become so absorbed in the back and forth with the Justices[287]—who ask an average of 133 challenging questions in each hour-long argument[288]—

285. *See, e.g.*, Richard Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1520–21 (2008) (reporting that the percentage of total non-Solicitor General arguments that included an expert oral advocate—an advocate with five or more prior arguments, or one affiliated with a legal organization whose attorneys have argued at least ten cases—were 16% in 2005, 23% in 2006, and 28% in 2007, as compared with 2% in 1980); *see also* Jeffrey L. Fisher, *A Supreme Court Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. ___ (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921430 ("Specialist counsel represented the criminal defendant or civil plaintiff in 43.6% of the cases" meeting the study criteria between 2004 and 2011.).

286. It is, of course, impossible to prove the point empirically, as there are not now and have never been cameras at the Supreme Court. *But see* e-mail from Carter G. Phillips, Partner, Sidley Austin LLP, to author (Aug. 5, 2011, 8:47 AM EST) (on file with author) ("I can't imagine [cameras] would affect how I argue because I already know the press is in the courtroom and probably will report on the case anyway. So whatever impact having the argument 'published' might be already exists. But I don't argue for the press in the courtroom; sometimes I do that on the steps afterward if the client wants me to. Also, the arguments are [audio] taped and the tapes are available within a week now so cameras that are largely concealed as they are in most courtrooms would have no marginal effect.") Mr. Phillips has argued seventy-one cases in front of the Court. *Id.*

287. *See, e.g.*, *id.* ("Generally speaking, [I am not thinking about observers in the courtroom when I argue before the Supreme Court.] I do remember hearing my wife laugh out loud at something Justice Breyer said to me that he did not intend to be a joke. And her laugh is distinctive. But 99.9% of the focus once the Court enters the bench is on the Justices."); Millett Interview, *supra* note 39 ("I almost never [think about observers] . . . [I am] hyperfocused on the Justices.").

288. *See* Liptak, *supra* note 267 (stating that "[i]n the 20 years that ended in 2008, the Justices

that it would be difficult for them to carry on the show for very long and still achieve the greater goal of winning the case.[289] As for the argument that cameras might "constrain" lawyers, "there is nothing lawyers should be willing to say to the Supreme Court that they could not say to millions of Americans."[290]

Finally, in the federal appellate courts, where cameras are already allowed in some courtrooms,[291] such grandstanding has been minimal, if not nonexistent.[292] Take, for example, the 2007 comments of Diarmuid F. O'Scannlain, United States Circuit Judge for the United States Court of Appeals for the Ninth Circuit:

> I am mindful of the concern that television cameras may increase the possibility of grandstanding by appellate lawyers or (dare I say it) judges themselves. My personal experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience. That observation does not mean, however, that this is a concern which

asked an average of 133 questions per hour-long argument").

289. Attorneys arguing before the Court have more important things to focus on. *See, e.g.*, Kimberly Atkins, *Top Supreme Court Litigators Give Tips on Arguing Appeals*, DETROIT LEGAL NEWS (Aug. 9, 2011), http://www.legalnews.com/detroit/1028908 (providing tips such as being engaged with and listening to the Justices).

290. Segall & Marder, *supra* note 18 (providing Eric Segall's argument for televising the Supreme Court).

291. Currently, only the Second and Ninth Circuits allow cameras in the courtroom. Am. Judicature Soc., *Cameras in Our Federal Courts—The Time Has Come*, 93 JUDICATURE 136, 172 (2010). The Second Circuit does not allow criminal proceedings or any pro se matters to be videotaped. *See* FED. R. CRIM. P. 53. Only one person for still photography with one camera and one person for radio and television with two cameras are permitted in the courtroom, based on a pool system that then distributes the coverage to other news media organizations. The panel of judges hearing the arguments has the authority to terminate coverage at any time. *See* SECOND CIRCUIT GUIDELINES CONCERNING CAMERAS IN THE COURTROOM 47 (adopted Mar. 27, 1996), *available at* http://www.ca2.uscourts.gov/clerk/Rules/LR/Appendix_B.pdf. In the Ninth Circuit, taping is permitted in all open court proceedings unless otherwise prohibited by statute. Only two television cameras, with one person on each camera, and one still photographer are permitted in the courtroom, obligatorily using the pool system. *See Guidelines for Photographing, Recording, and Broadcasting in the Courtroom*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000110 (last visited Oct. 26, 2012).

292. *See Life in the Federal Judiciary* (C-SPAN television broadcast Aug. 27, 2010), *available at* http://www.c-spanvideo.org/program/295217-1 (statement of Chief Justice Beverley McLachlin of Canada) (relaying that, on the only occasion over twenty years when she could remember a lawyer grandstanding, she "told him to sit down," and the lawyer did).

should not be part of the calculus in deciding whether to grant media access in a particular case.[293]

Comparisons to the grandstanding of members of the House and Senate on C-SPAN, moreover, while enhancing the observation effect story, are likely misplaced. Members of Congress are elected and must appeal to constituents to keep their jobs.[294] Supreme Court Justices, on the other hand, hold their jobs for life;[295] advocates arguing before the Court must attend to the interests of their clients or risk malpractice suits and bar disciplinary actions.[296]

Even if the story that cameras would change the Supreme Court's proceedings held water, we would still need to ask about the power of the story. Is the behavior change significant enough for us to say that observers should not be allowed in the Court? If observation does change behavior, does it change it for the better? And if so, how? Would more scrutiny improve Court performance rather than detract from it?

5. We don't get that technology stuff, anyway

> *"[T]he current justices have—though this is not new—a low comfort level with . . . technology . . . at a time when technology . . . is playing an increasingly large role in culture and society."*[297]

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293. Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323, 327 (2007).

294. Joseph Ignagni & James Meernik, *Explaining Congressional Attempts to Reverse Supreme Court Decisions*, 47 POL. RES. Q. 353, 356–57 (1994).

295. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour").

296. *See, e.g.*, Rachel M. Zahorsky, *Clients, Law Firms Get "Savage" As Legal Malpractice Claims Increase*, A.B.A. J., Feb. 17, 2009, *available at* http://www.abajournal.com/news/article/clients_law_firms_get_savage_as_legal_malpractice_claims_increase.

297. *See, e.g.*, Posner, *supra* note 207, at 23–24. Note that, as technological advances have flooded telecommunications and other fields, litigation over how new technology may legally be used ensues. Eventually, these cases make their way to the Supreme Court. *See, e.g.*, Ent. Mechants v. Brown, 131 S. Ct. 2729 (2011) (holding that California statute restricting minors' access to violent video games violated the First Amendment); City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (holding City's search of officer's text messages did not violate the Fourth Amendment); Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007) (holding that a copy of computer software was a "component" under the Patent Act; MGM Studios Inc. v. Grokster, Ltd, 545 U.S. 913 (2005) (holding software companies, which distributed software enabling peer-to-peer file sharing, liable for copyright violations); United States v. Am. Library Ass'n., 539 U.S. 194 (2003) (plurality opinion) (holding Children's Internet Protection Act—requiring libraries that received federal funds to establish Internet access install filters blocking obscene materials, child pornography, and materials harmful to minors—constitutional under Fourth Amendment); Kyllo v. United States, 533

> *"Shortly after she arrived, Justice Kagan succeeded in getting a new frozen yogurt machine in the cafeteria. This accomplishment is particularly significant since no one at the Court can remember any of the prior Justices on the [Cafeteria] Committee doing anything."*[298]

This false perception that the Justices are uncomfortable with technology is a prevalent one; one legal blogger recently complained, "the technological ignorance of the Supreme Court is a concern, particularly as they try to resolve cases [involving twenty-first-century technology]."[299] As the narrative goes, because most members of society are "wired," and these cases will impact them directly,[300] we need Justices who understand and use technology.[301] Some commentators

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U.S. 27 (2001) (police use of thermal imaging device not available to the general public constitutes a "search" in violation of the Fourth Amendment); Reno v. ACLU, 521 U.S. 844 (1997) (holding federal law making it illegal to display indecent material online such that minors could receive it unconstitutional under First Amendment); Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding human-made organisms patentable subject matter).

298. *Annual Fourth Circuit Court of Appeals Conference: Chief Justice John G. Roberts, Jr.* (C-SPAN television broadcast June 25, 2011), http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/.

299. Arthur Bright, *A Plea for a Tech-Savvy Justice,* CITIZEN MEDIA L. PROJECT (Apr. 21, 2010), http://www.citmedialaw.org/blog/2010/plea-tech-savvy-justice (arguing that the President should appoint a Justice who is familiar with modern technology); *see also* Posner, *supra* note 207, at 23–24 ("[T]he current justices have—though this is not new—a low comfort level with . . . technology . . . at a time when technology . . . is playing an increasingly large role in culture and society.").

300. Bright, *supra* note 299.

301. Often pointed to as a part of this narrative is the fact that Chief Justice Roberts chooses to write his opinions longhand, using paper and pen. *See* C-SPAN Roberts interview, *supra* note 100. Evidence of the Justices' "Luddite" tendencies also lies, in the eyes of some, in the Court's questions during the oral argument in *City of Ontario v. Quon*, a dispute over the right to privacy in text messages sent from government-issued pagers. While few Court watchers were surprised that an issue concerning privacy in the use of twenty-first century technology had reached the Court, most were amused to hear that the Justices (as evidenced by their questions and remarks during oral argument) seemed to have little idea about what a text message was or how such messages were delivered—or so they interpreted the exchange. *See* Transcript of Oral Argument at 15, 29, 47–48, City of Ontario v. Quon, 130 S. Ct. 2619 (2010) (No. 08-1332), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf (Justice Alito: "If someone wanted to send a message to one of these pagers, what sort of a device would you need? Do you need to have another pager, or can you—could you send a message to one of these devices from some other type of device?" at 15; Chief Justice Roberts: "Maybe—maybe everybody else knows this, but what is the difference between a pager and e-mail?" at 29; Chief Justice Roberts: "Well, then they can't have a reasonable expectation of privacy based on the fact that their communication is routed through a communications company." Mr. Dammier: "Well, they—they expect that some company, I'm sure, is going to have to be processing the delivery of this message. And—" Chief Justice Roberts: "Well, I didn't—I wouldn't think that. I thought, you know, you push a button; it goes right to the other thing." Justice Scalia: "You mean it doesn't go right to the other thing?" Mr. Dammeier: "It's—I mean, it's like with e-mails. When we send an e-mail, that goes through some e-

who engage in the Luddite narrative (including the Chief Justice) attribute the Court's seeming ignorance about technology to generational concerns (in that many of the Justices are of an age where they have not used technology throughout their careers).[302]

But a closer look at the Luddite story reveals that a generational explanation does not compute in light of the fact that several Justices are quite young,[303] as least as compared to the Justices they replaced (some of whom, in fact, have actively used technology in a publicly visible way post retirement).[304] Moreover, even were this explanation to be satisfactory in terms of the ages of the Justices, it would not be were we to compare the Justices to, for example, older heads of large companies, who undoubtedly use every technological advance available to them in order to achieve efficiency and better serve their clientele. Finally, it has been widely speculated that the Justices use law clerks, not only as legal assistants, but as liaisons to the "real world,"[305] as evidenced by Justice Kagan's comment in *Entertainment Merchants v. Brown* that "Mortal Kombat—which is, you know, an iconic game, which I'm sure half of

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mail provider, whether it be AOL or Yahoo. It's going through some service provider. Just like when we send a letter or package, it's going through—some provider is going to move that for us, until it gets to the end recipient. And like the mail, that message enjoys an expectation of privacy while it's with the Post Office—" Justice Scalia: "Can you print these things out? Could Quon print these—these spicy conversations out and circulate them among his buddies?" at 47–48.). But as the Huffington Post observed, "[I]t should be noted that the Justices' queries may not signal their confusion, but rather their efforts to clarify specific, key details pertaining to the 'sexting' exchange." Bianca Bosker, *Sexting Case Befuddles the Supreme Court: What's the Difference Between Email and a Pager?*, HUFFINGTON POST, June 21, 2010, http://www.huffingtonpost.com/2010/04/21/ontario-quon-sexting-case_n_545764.html.

302. *E.g.*, Chief Justice John G. Roberts, Jr., U.S. Supreme Court, Remarks at the Supreme Court to a group of students from the Drexel University Earle Mack School of Law (Mar. 1, 2011).

303. Chief Justice John G. Roberts, Jr., is fifty-seven years old; he replaced Chief Justice William Rehnquist, who was eighty years old when he died in office. Justice Samuel Alito is sixty-two years old; he replaced Justice Sandra Day O'Connor, who was seventy-five years old when she retired from the Court. Justice Sonia Sotomayor is fifty-eight years old; she replaced Justice David Souter, who was sixty-nine years old when he retired from the Court. Justice Elena Kagan is fifty-two years old; she replaced Justice John Paul Stevens, who was ninety years old when he retired from the Court. *See Biographies of the Current Justices of the Supreme Court*, *supra* note 213.

304. David Kravets, *All Rise: Supreme Court's Geekiest Generation Begins*, WIRED (Oct. 1, 2010), http://www.wired.com/threatlevel/2010/10/supreme-court-2010-2011-term. *See also* ICIVICS, http://www.icivics.com (last visited Oct. 20, 2012) (website founded by retired O'Connor, J. to increase student knowledge about civics).

305. *See, e.g.*, JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 186–88 (2007) (discussing how the Court's attitude toward homosexuals changed when "a new generation of law clerks brought a new attitude toward homosexuality"); Christopher R. Benson, *A Renewed Call for Diversity Among Supreme Court Clerks: How A Diverse Body Of Clerks Can Aid The High Court As An Institution*, 23 HARV. BLACKLETTER L. J. 23, 49 (2007).

the clerks who work for us spent considerable amounts of time in their adolescence playing."[306]

Indeed, aside from the famously-technophobic—and now retired—Justice David Souter,[307] the Justices do not seem to reject technology out of hand.[308] According to the Court's Public Information Officer: "All of the Justices have access to various personal digital-assistant (PDA), smartphones, and e-reader options for use in Court-related work."[309] For example, Justice Kagan uses a Kindle to transport and read briefs,[310] and Justice Scalia uses an iPad for the same purpose.[311] Justice Thomas has indicated that he and other Justices have Blackberrys.[312] At least Justice

306. *See* Transcript of Oral Argument at 58–59, Entm't Merchs. v. Brown, 131 S. Ct. 2729 (2011) (No. 08-1448), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf.

307. *See Souter Won't Allow Cameras in High Court*, *supra* note 4 (quoting Souter, J. as saying, "The day you see a camera come into our courtroom, it's going to roll over my dead body.").

308. *But see* Debra Cassens Weiss, *Justices Don't Communicate by Email, Kagan Says*, A.B.A. J., Oct. 17, 2011, *available at* http://www.abajournal.com/news/article/justices_dont_communicate_by_email_kagan_says/?utm_source=maestro&utm_medium=email&utm_campaign=tech_monthly (reporting on a speech by Justice Kagan at the National Conference of Bankruptcy Judges and quoting the Justice as saying that "Supreme Court clerks use email to talk to each other, but the justices prefer to communicate with their colleagues by hand-delivered memos . . . the justices 'ignore 25 years of technology' in communicating with each other . . . ."). The public comments following this story on the ABA website are instructive about the public's acceptance and criticism of the Luddite myth, stating, for example, "They probably go out on tall buildings in the evening and flash messages to one another with flags in semaphore signal code." (B. McLeod, Oct. 17, 2011 8:35 PM CDT) and "It just goes to show how out of touch our judiciary is with the public." (Fed JD, Oct. 26, 2011 6:53 AM CDT). *Cf.* "I find it interesting that the story doesn't tell you whether they use email in their personal lives, just that they don't between the other 8 justices. It's difficult to say whether they are out of touch with technology. They may just prefer to exchange correspondence with each other in a slow and deliberate manner. I've read that they think of themselves as not so much a team but rather as a collective of individuals, such that casual emails wouldn't fit with their workplace mentality." (Justin, Oct. 26, 2011 9:05 AM CDT) (perceiving the subtext and missing facts in the story).

309. E-mail from Kathy Arberg, *supra* note 116.

310. *See* Interview by C-SPAN with Justice Kagan, U.S. Supreme Court, in D.C. (Dec. 9, 2010), *available at* http://www.youtube.com/watch?v=1J7xlkuTvvo ("I have a Kindle that my briefs are on . . . . [I]t is endless reading . . . . [S]ome of these cases there'll be, you know, 40, 50 briefs. So there's a lot of reading and you know that's a big part of the job and if a Kindle or an iPad can make it easier, that's terrific.").

311. A "spy" for the Washington Examiner reported spotting Scalia working on his iPad at the baggage area of Reagan National Airport in Washington, D.C. Nikki Schwab & Katy Adams, *Sightings: Scalia uses iPad; Ginuwine, Green Out on the Town*, WASH. EXAMINER, Jan. 1, 2011, *available at* http://washingtonexaminer.com/article/139250.

312. *Financial Services and General Government Appropriations for 2008—Supreme Court: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. (2007) (statement of Thomas, J.).

Thomas carries his work around with him on a laptop.[313] Justice Breyer has a Twitter account, although only to follow others and allow a very few people (including his children) to follow him.[314]

And so what misperception do the Justices hope to perpetuate by declaring themselves technologically unsophisticated? It is hard to say. Perhaps, however, by declaring themselves helpless in the face of new technological developments, they hope to engender sympathy and deflect critics who would otherwise insist on the Court's adopting new technologies like cameras at the Supreme Court.

6. If it ain't broke, don't fix it

Finally, the Justices have advanced a story seemingly based on logic, all the better to appeal to a trusting listener: If it ain't broke, don't fix it.[315] But for us to accept this narrative, we would have to agree that the only possible atmosphere in which cameras should be allowed at the Court would be to right a wrong. To frame the issue in that way is to defend against a spurious argument, perhaps (at least subconsciously) to distract from the real one: that televising Supreme Court proceedings would allow the American public to observe what a good job the Court does in questioning and conversing with advocates.[316]

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313. *Id.*

314. *Financial Services and General Government Appropriations for 2012—Supreme Court: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 112th Cong. 170 (2011) (statement of Breyer, J.) ("[I] actually have a tweeting thing. Because I was very interested in the Iranian revolution, remember, when they just had this uprising over a year ago. And I sat there fascinated, because you could actually look through the tweeting and you could see what was going on. You could see the violence. You could see women killed. It was terrible.").

315. *Financial Services and General Government Appropriations for 2009—Supreme Court: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 110th Cong. 123 (2008) (statement of Kennedy, J.) ("[I] do not know any Congressman or Member of the legislative branch who has seen particular arguments that he or she thinks are flawed and that could be improved if we were under the scrutiny of national television.").

316. *See, e.g.*, e-mail from Phillips, *supra* note 286 ("I . . . think the public's respect for the Court would skyrocket if they could see the justices in action. Then they would know that [the Justices] are not stick figures and caricatures of real people."); Justice Kagan, U.S. Supreme Court, Remarks at the Aspen Institute's McCloskey Speaker Series (Aug. 2, 2011), *available at* http://www.aspeninstitute.org/video/conversation-justice-elena-kagan-moderated-elliot-gerson ("I came to [the view that cameras in the Supreme Court would be a good thing] when I was Solicitor General and I was sitting there . . . watching case after case after case, and th[e Court, before I was on it, wa]s an unbelievable Court to watch . . . It was—everybody was so prepared, so smart, so obviously, deeply concerned about getting to the right answer. You know, I thought if everybody could see this, it would make people feel so good about this branch of government and how it's operating. And I thought it's such a shame, actually, that only two hundred people a day can get to

7. The drawbacks of changing the story

> *"Destruction of magic and other practices of witchcraft is a calculated risk."*[317]

With any silver lining, there are always clouds. And with cameras at the Supreme Court, the major drawback comes with changing the story to an unintended one or one that does not accurately reflect the Court's work.

Take, for example, the broadcast of oral arguments. Were the Court to allow networks to show video footage of oral arguments, the public might perceive a story in which the Justices make their decisions based largely on those arguments; of course, Court scholars know that written briefs play at least as great a role in the Court's consideration of a case, if not a much more significant one.[318] Ideological bent, judicial philosophy, Court dynamics, and other factors play major roles in the Court's decision-making process, and these would be left out of a camera-generated story, one where the public would have to reach its own conclusions based on what it saw rather than on what it learned through other sources. Of course, there is nothing to say that viewers could not access other sources for information about other aspects of the Court's work, including the decision-making process.[319] And, as

see it . . . it's an incredible Court . . . just in its level of preparation and engagedness and intelligence and real concern.").

317. Mason, *supra* note 57, at 1404 (discussing the downside of allowing the public to see the Court from a legal realist's point of view).

318. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 139 (2008) ("Many lawyers view oral argument as just a formality, especially in courts that make a practice of reading the briefs in advance. . . . But as far as affecting the outcome is concerned, what can 20 minutes or half an hour of oral argument add to what the judge has already learned from reading a few hundred pages of briefs, underlining significant passages and annotating the margins? This skepticism has proved false in every study of judicial behavior we know. Does oral argument change a well-prepared judge's mind? Rarely. What often happens, though, is that the judge is undecided at the time of oral argument (the case is a close one), and oral argument makes the difference. It makes the difference because it provides information and perspective that the briefs don't and can't contain."). *But see* C-SPAN Roberts interview, *supra* note 100 (stating that he often changes his mind after an excellent oral argument); Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 570 (1999) ("In my view it is in most cases a hold-the-line operation. In over eighteen years on the bench, I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument."); William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 4 (1999) ("[R]arely is good oral advocacy sufficient to overcome the impression made by a poorly written brief.").

319. In fact, an ideal situation would be one in which the public could watch the Court's work

explained in Part V.A., were the Court to televise all of its public sessions, including opinion announcements and orders, the public would have a fuller picture of the Court's work, if not a complete one.

Televising oral arguments might also give rise to apprehension on the part of some lawyers about arguing, not only before the highest Court in the land but also before the entire nation. Unfortunately, were "regular" lawyers to be deterred from arguing their clients' cases before the Court, some of the democratic story might be lost—and some of the aristocratic one reinforced—by virtue of the fact that members of the elite Supreme Court bar would make even more of the arguments.[320] Still, according to at least one study, were attorneys who focus on Supreme Court practice to make even more of the arguments, their clients would be more successful.[321]

Apart from oral argument considerations, other narrative concerns become evident when we consider cameras at the Supreme Court. One is based on characterization: if cameras record their public work, the Justices might change their personalities on the bench, thereby changing the story the Court might otherwise tell. Still, if the Justices as characters are less than serious,[322] a change in the perceived story might lead to a change in the real story, converting the Justices from jousters to decision makers who reflect solemnity in what is most certainly a solemn setting.

Also, the cameras themselves might play a role in altering the story. This point is distinct from that arguing that televising the Court would change the story the public perceives; rather, this point is one of focus, camera angle, and editing. Cameras that zoom in on a Justice who is turning red in the face or one who is sitting back in his chair with his eyes closed tell only one part of the story, perhaps a sensationalistic account of a narrative that is likely much more nuanced. Cameras that shoot from below promote the majesty narrative, raising, as they do, the Justices even higher. While deference is due to the Justices on the issues

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on television or the internet and then read about what they had seen on blogs, in books, or in the print media, all the better to access a more complete vision of the Court's function in our federal government.

320. *See supra* notes 285–86 and accompanying text for a discussion of the Supreme Court bar's role in arguing cases before the Court.

321. *See* Fisher, *supra* note 285 (finding a 16.0%–22.7% advantage to clients for representation by a Supreme Court specialist versus a non-specialist). Naturally, were both sides to be represented by Supreme Court specialists, the advantage would presumably disappear, but both sides would have excellent and experienced advocates, an important democratic principle.

322. *See supra* note 271 and accompanying text (describing the Justices' less-than-attentive behavior on the bench).

of where and how to place the cameras, the broadcasters would want to inform the Justices about filming options that would best present an objective, unaffected story rather than one influenced by the cameras.

Finally, of course, stories require audiences. Even if the Court allows cameras to film and broadcast its public work, the transformation of narrative will be less than successful if the public does not watch. Still, given that more people would have access to the Court than currently do if cameras were to be allowed, the audience could only expand, and at least a few more Americans would become part of the Supreme Court story.

Comparing the story the Court currently tells versus the story that cameras might tell lays the groundwork for future research. Such work might include surveying members of the Supreme Court bar—as well as those lawyers who have recently had a single argument—about how cameras would affect them. It might also look closely at the legitimacy issue and analyze whether cameras would actually undermine the public's support for the Court. Finally, once broadcasts of Supreme Court proceedings become as commonplace as those of the presidential debates, it will be critical to study the impact cameras have on the public's awareness of the Court. Such work might include studying the public's knowledge about the Court's cases, decision-making process, and role in the federal government. It might also tie video broadcasts of the Court's work to the public's increased—or decreased—understanding of the Court as a presidential election issue.

VI. CONCLUSION

Just as the Oracle at Delphi was for the Greeks, the Supreme Court appears to most Americans to be a mystical, majestic mouthpiece making pronouncements about important social and governmental issues for the benefit of the American public. For as long as the Justices continue to prohibit cameras at the Court, however, the American public will be guided in its perceptions by the stories that the Court's rituals and policies, its images, and architecture tell. Without at least virtual access to the Court's work, the public cannot easily and directly learn about the Court's democratic story.

Cameras in the Court are not a perfect solution to a geographical problem: a federal government, including a high Court, located on the east coast of a very large country, far from where many of its constituents live. But in the interests of changing the rhetoric and the narrative surrounding the Court, the Court should "open up its doors"

and allow Americans who cannot physically enter the Court to do so through television cameras. In the end, the Court's interest in preserving its mystique and secrecy is outweighed by the public's interest in accessing its government, to understanding what the judicial branch does, and to forming its own opinions—gleaning its own stories—from what it sees.